Petition

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ALEXANDER L. STEVAS,
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81-1056

No._____

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

STATE OF WASHINGTON,

Petitioner,

v.

GEORGE E. MYERS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH O. EIKENBERRY,
Attorney General,

EDWARD B. MACKIE,
Chief Deputy Attorney General,
Counsel of Record

MICHAEL P. LYNCH,
Assistant Attorney General,

Temple of Justice — M.S. FN-61
Olympia, Washington 98504
(206) 754-1415

Attorneys for Petitioners

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE "CAUSE" REQUIREMENT OF *WAINWRIGHT V. SYKES*, 433 U.S. 72 (1977), FOR OBVIATING A STATE PROCEDURAL WAIVER, MAY BE FOUND WHERE A FAILURE TO RAISE A BURDEN-SHIFTING JURY INSTRUCTION ON DIRECT APPEAL IS PREDICATED SOLELY ON THE FACT THAT THE DEFENDANT'S TRIAL AND APPEAL OCCURRED MANY YEARS BEFORE A CHANGE IN THE PREVAILING CONSTITUTIONAL LAW ON PRESUMPTIONS AND BURDENS OF PROOF?*

II. WHETHER A FEDERAL COURT, UPON REVIEWING A STATE COURT CONVICTION IN A HABEAS CORPUS PROCEEDING, MUST CONSIDER PREJUDICE TO THE STATE IN ITS ABILITY TO RESPOND TO THE PETITION *AND* PREJUDICE IN ITS ABILITY TO RETRY THE PETITIONER, OCCASIONED BY A TWENTY-YEAR DELAY IN FILING THE PETITION UNDER 28 U.S.C. § 2254, RULE 9(a)?

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*This Court has granted certiorari on a virtually identical issue in *Isaac v. Engle* (S.Ct. No. 80-1430).

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit in *Myers v. State of Washington* is reported at 646 F.2d 355 (9th Cir. 1981). The United States District Court for the Eastern District of Washington, in granting the State of Washington's motion for summary judgment, did not issue an opinion.

The decision of the Washington State Supreme Court is reported in *In re Myers*, 91 Wn.2d 120, 587 P.2d 532 (1979) *cert. denied* 442 U.S. 912.

JURISDICTION

The panel decision of the United States Court of Appeals for the Ninth Circuit in *Myers v. State of Wash-*

ington, supra, was entered on May 26, 1981. Rehearing en banc was denied September 8, 1981.

Jurisdiction is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

United States Constitution, Amendment XIV, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2254, Rule 9(a):

"Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred."

Washington State Court Rules, RAP 16.3 through 16.15 (pertinent text set forth in Appendix 6).

STATEMENT OF THE CASE

Myers was found guilty of second degree murder in a jury trial in King County, Washington. Sentence was entered on October 3, 1957.[1]

Subsequent to conviction, Myers appealed his conviction to the Washington State Supreme Court. The published opinion of Myers' direct appeal is reported in

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[1]At the present time petitioner is serving sentences for Assault in the Second Degree and Felon in Possession of a Firearm (King County Cause No. 70184), and Robbery and Habitual Criminal (King County Cause No. 68725). All these sentences were imposed on February 13, 1975.

State v. Myers, 53 Wn.2d 446, 334 P.2d 556 (1959). On that appeal, Myers did challenge Jury Instruction No. 7, which is under attack in the instant proceedings. He did so, however, on the entirely different ground that it constituted a comment on the evidence. Myers did not then challenge Jury Instruction No. 5 at all.

Nineteen years after Myers' conviction, he filed a personal restraint petition in the Washington State Court of Appeals. Myers' state court petition was ultimately decided by the Washington State Supreme Court, which denied Myers' petition after concluding that a retroactive application of later enunciated constitutional standards was unwarranted on the facts of Myers' case. The published decision on Myers' state court personal restraint petition is reported in *In re Myers*, 91 Wn.2d 120, 587 P.2d 532 (1978).

On January 23, 1979, Myers filed a writ of habeas corpus with the United States District Court for the Eastern District of Washington. Therein Myers alleged, *inter alia*, that Jury Instructions Nos. 5 and 7[2] as given in his trial unconstitutionally shifted the burden of proof onto the defendant. The district court, on October 4, 1979, granted the State of Washington's motion for summary judgment and denied the petition.

Upon appeal, a panel of the United States Court of Appeals for the Ninth Circuit, on May 26, 1981, reversed the district court's granting of the State of Washington's motion for summary judgment, and granted Myers a writ of habeas corpus. The majority found error in the giving of Jury Instructions Nos. 5 and 7 at Myers' trial, and concluded that said jury instructions unconstitutionally shifted the burden of proof onto the defendant.[3]

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[2]Jury Instruction Nos. 5 and 7 are quoted in full in footnote 11 of the Ninth Circuit's opinion, attached in the appendix.

[3]Specifically, the Ninth Circuit found that the language in Jury Instruction No. 7 which permitted the jury to presume "that the death of the deceased was designed by the defendant" worked "prejudice" on the petitioner by relieving the state of the burden of proving the element of intent. This finding of "prejudice" was made in spite of conflicting interpretations by the court of the evidence introduced at trial.

Circuit Judge Poole dissented from the majority's opinion.

The State of Washington petitioned for rehearing en banc. Rehearing was denied on September 8, 1981.

Myers' petition for writ of habeas corpus was originally filed in the United States District Court for the Eastern District of Washington pursuant to 28 U.S.C. §§ 2241 through 2254.

ARGUMENT IN SUPPORT OF CERTIORARI

This case presents novel, complex and important issues of both federal constitutional law and federal-state comity interests.

I. WHETHER THE "CAUSE" REQUIREMENT OF *WAINWRIGHT V. SYKES*, 433 U.S. 72 (1977) FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND WHERE A FAILURE TO RAISE A BURDEN-SHIFTING JURY INSTRUCTION ON DIRECT APPEAL IS PREDICATED SOLELY ON THE FACT THAT THE DEFENDANT'S TRIAL AND APPEAL OCCURRED MANY YEARS BEFORE A CHANGE IN THE PREVAILING CONSTITUTIONAL LAW ON PRESUMPTIONS AND BURDENS OF PROOF?

In its decision the Ninth Circuit Court of Appeals ruled that the "cause" requirement of *Wainwright v. Sykes*, 433 U.S. 72 (1977) has been met if the failure to challenge burden-shifting jury instructions, in either the trial court or on direct appeal, is based upon a subsequent change in prevailing constitutional law which defense counsel could not have reasonably anticipated at the time of trial or appeal. This Court held in *Wainwright, supra*, however, that the petitioner's failure to comply with the state's contemporaneous objection rule was an independent and adequate state procedural ground sufficient to bar federal habeas review, absent a showing of both (a) "cause" for the failure and (b) actual "prejudice" to the petitioner by reason of the alleged constitutional violation.

The Ninth Circuit's interpretation and definition of the "cause" prong outlined in *Wainwright* was based upon the Sixth Circuit's decision in *Isaac v. Engle*, 646 F.2d 1129 (1980). This Court has now granted certiorari to review the decision in *Isaac v. Engle, supra*, on the identical issue presented in this petition (*Isaac v. Engle*, Supreme Court No 80-1430). Likewise, this Court has also granted certiorari in the case of *United States v. Frady*, 636 F.2d 506 (D.C. Cir. 1981) (Supreme Court No. 80-1595), on the closely related issue of what constitutes "cause" in a habeas corpus review of a federal conviction.

Both this case and *Isaac v. Engle* present the important, ultimate question of how the "cause" requirement of *Wainwright* is to be defined when determining if a state procedural bar precludes federal habeas corpus review of a state court conviction. In *Wainwright*, this Court left open for resolution in future decisions the precise definition of the "cause" and "prejudice" standard, *Wainwright v. Sykes*, 433 U.S. at 87. It is the position of the State of Washington that the Ninth Circuit has here improperly defined "cause".

The Ninth Circuit determined that "cause" for Myers' failure to raise his constitutional argument on direct appeal existed because that argument depended on changes in the prevailing law on presumptions and burdens of proof occurring many years after that appeal. That determination, however, is in contradiction to the reasoning of this Court's decision in *Hankerson v. North Carolina*, 432 U.S. 233, 244, n. 8 (1977). See, n. 8 of the opinion in *Hankerson, supra*, where this Court said:

> "Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. *If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to Mullaney many defense lawyers made appropriate objections to jury instructions incorporating those presumptions.* Petitioner made none here. The North Carolina

> Supreme Court passed on the validity of the instructions anyway. *The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that a failure to object to a jury instruction is a waiver of claim of error.* See, example Federal Rule of Criminal Procedure 30." (Emphasis added).

In *Hankerson*, this Court held *Mullaney v. Wilbur*, 421 U.S. 684 (1975) to be fully retroactive. The above statement was made in reaction to the state's concern that such a holding would substantially undermine the finality of convictions entered prior to *Mullaney* and open a flood of new trials. *Cole v. Stevenson*, 620 F.2d 1055 at 1060 (4th Cir. 1980).

Certainly, when this Court was thus considering the flood of new trials which would be effectuated by a retroactive application of *Mullaney*, it intended to allow the states to implement a state procedural bar to federal habeas corpus review. Undoubtedly, therefore, when the Court decided *Wainwright v. Sykes*, only six days after the *Hankerson* decision, its members were cognizant of the reasoning behind n. 8 of the *Hankerson* opinion when they created the cause and prejudice exception in *Wainwright*. See generally, *Cole v. Stevenson, supra.*

If grounds for objection which were either unknown or unacceptable under prevailing constitutional law at the time of trial and appeal constitute sufficient "cause" within the *Wainwright* exception, then the language of n. 8 in the *Hankerson* opinion is meaningless and the Ninth Circuit's formulation in this case has created an exception to *Wainwright* that will surely devour it. *Myers v. State of Washington* (Poole, J. dissenting).

A decision to give a constitutional ruling retroactive application is one of policy and not law. *Linkletter v. Walker*, 381 U.S. 618 (1965). The important issue upon which the State of Washington seeks review by this Court is not one of law, but rather one of policy, dealing with the scope of review of state court convictions in federal habeas corpus proceedings. Specifically, the State of Washington argues that the interest in the finality of convictions not subject to the frustrations associated with retrial years

after the original proceeding outweighs any interest in readjudicating convictions according to subsequently developed legal standards.[4] Therefore, because this case presents an important issue dealing with federal-state comity interests in the scope of federal habeas corpus review of state court convictions, this case should be decided by this Court.

The decision of the Ninth Circuit in this case is also in conflict with the en banc decision in *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir. 1980). While the Ninth Circuit, in this case, and the Sixth Circuit in *Isaac v. Engle*, certiorari granted in Cause No. 80-1430, have both held that a subsequent change in constitutional law is sufficient cause for failure to object at trial or present the issue on appeal, on the other side, the Fourth Circuit Court of Appeals in *Cole* has determined that failure to know the prevailing constitutional law would change was not sufficient cause under *Wainwright v. Sykes. Cole v. Stevenson, supra*, see also *Breest v. Perrin*, 495 F.Supp. 287 (D.C. N.H. 1980).[5]

In *Wainwright*, this Court stated that the definition of "cause" and "prejudice" would be left to future decisions. The federal courts of appeals are in conflict as to the definition of "cause". Therefore, the ultimate resolution of this conflict, and the definition of "cause" should be determined by this Court.

The decision of the Ninth Circuit Court of Appeals in this case is also in direct conflict with the decision of the Washington State Supreme Court in *In re Myers, supra*, as to whether the state court may, through the use of a state procedural bar, preclude federal habeas corpus review of issues not raised on direct appeal in the state court. A resolution of this issue by the United States Supreme Court is necessary in order to enable the

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[4]This is the conclusion reached by the Washington State Supreme Court when Myers challenged Jury Instructions Nos. 5 and 7 in a state court personal restraint petition, after a careful balancing of the interests involved. *In re Myers*, 91 Wn.2d 20, 587 P.2d 532 (1978).

[5]*United States v. Frady, supra*, cert. granted in Supreme Court Cause No. 80-1595, has also interpreted "cause" in a federal habeas corpus review of a federal conviction, under reasoning similar to that contained in *Isaac* and the Ninth Circuit's decision in this case.

Washington State Supreme Court and the Ninth Circuit Court of Appeals to consistently interpret the parameters of a state procedural bar in a subsequent federal habeas corpus review.

II. WHETHER A FEDERAL COURT, UPON REVIEWING A STATE COURT CONVICTION IN A HABEAS CORPUS PROCEEDING, MUST CONSIDER PREJUDICE TO THE STATE IN ITS ABILITY TO RESPOND TO THE PETITION *AND* PREJUDICE IN ITS ABILITY TO RETRY THE PETITIONER, OCCASIONED BY A TWENTY-YEAR DELAY IN FILING THE PETITION UNDER 28 U.S.C. § 2254, RULE 9(a).

In failing to consider the prejudice to the State of Washington in both its ability to respond to Myers' petition *and* to retry Myers after a twenty-three year delay, the Ninth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

This case came before the Ninth Circuit after summary judgment was granted to the State of Washington in the district court below. The record was sparse and incomplete with regard to the prejudice to the State of Washington in its ability to respond to Myers' petition caused by the twenty-three year delay between the date of Myers' conviction, 1957, and the filing of his petition.[6] Yet, rather than remand the case back to the district court for specific fact finding on the question of prejudice to the State of Washington in its ability to respond to Myers' petition and to retry him, the court proceeded to decide this issue, as it is required to do by 28 U.S.C. § 2254, Rule 9(a), in a factual vacuum.

In n. 10 of the Ninth Circuit's opinion, the court said:

> "Respondents, in their summary judgment motion, merely asserted in general terms that 'any set of facts which could be marshalled now on retrial would bear

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[6]The Ninth Circuit also failed to specify the reasons why the Washington State Supreme Court's determination in *In re Myers*, *supra*, that due to the time delay of twenty some years, there would be prejudice to the State on retrial, was incorrect. 28 U.S.C. § 2254(d); *Sumner v. Mata*, 446 U.S. 1302 (1980).

> only a shadow of the reliability they had when first presented.' They offered no specific facts as to witnesses now unavailable, records now inaccessible, or other factors supporting their assertion."

Thus it is clear that the Ninth Circuit failed to consider the prejudice to the State of Washington in its ability to respond to the petition and to retry Myers. The court should have remanded this case to the district court for fact finding with regard to the true cause for appellant's failure to raise his constitutional argument on a direct appeal as opposed to the court deducing "cause" from a chronological sequence of changes in the prevailing standard of constitutional law. See, generally, *Tyler v. Phelps,* 643 F.2d 1095 (5th Cir. 1981) (court considered testimony of trial defense counsel). *Washington v. Estelle,* 648 F.2d 276 (5th Cir. 1981) (not for a federal court to speculate as to possible reasons for failure to object).

In addition to this failure to consider the prejudice to the respondent *in its ability to respond,* the Ninth Circuit also failed to consider the prejudice to the State of Washington in its ability to retry Myers after a twenty-three year lapse in time. The Washington State Supreme Court concluded that the State of Washington would be prejudiced in its ability to retry Myers; evidence necessary for retrial may no longer be extant. Witnesses may have moved or died and memories will certainly have dimmed. Further investigation, difficult at best, may well be impossible. *In re Myers,* 91 Wn.2d 120 (1978).

Both the state and federal government have an interest in maintaining the finality of convictions that were valid under constitutional standards applicable at the time. *McMann v. Richardson,* 397 U.S. 759 (1970) (applying subsequent constitutional standards to guilty pleas). Reopening a case carries disadvantages for the state but also for those who have been convicted.

> "Both the individual criminal defendant and society have an interest in insuring that at some point there will be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but

> rather on whether a prisoner can be restored to a useful place in the community."

Sanders v. United States, 372 U.S. 1 (1963), Harlan, J. dissenting.

> "Society suffers either the burden on judicial and prosecutorial resources entailed in retrial or the miscarriage of justice that occurs when a guilty offender is set free only because effective retrial is impossible years after the offense."

Hankerson v. North Carolina, supra, Powell, J. concurring.

Upon review of a state conviction, a federal court must consider the prejudice to the state in its ability to respond caused by a delay in the filing of the petition. 28 U.S.C. § 2254, Rule 9. Likewise, the interests of comity demand that a federal court consider retrial prejudice to the state when adjudicating a habeas corpus petition. Although Rule 9(a) of 28 U.S.C. § 2254 (state conviction) does not specifically address the requirement that retrial prejudice be considered, the advisory committee notes to Rule 9 of 28 U.S.C. § 2255 (federal conviction), in construing identical language, required consideration of prejudice in any possible retrial.

The Court promulgated parallel 9(a) rules for federal habeas review of federal and state convictions. There is no reason for intepreting the identical language in these two rules differently. Indeed, this Court has expressed concern that state and federal prisoners seeking habeas relief be treated equally. *Francis v. Henderson*, 425 U.S. 536 (1975).

The State of Washington argues that the federal court must consider the prejudice to the state in its ability to retry a criminal defendant years after the original trial. In this case the Ninth Circuit failed to consider any prejudice to the State of Washington, in spite of the requirement of 28 U.S.C. § 2254, Rule 9(a). Therefore, this Court should exercise its supervisory jurisdiction, and also clarify whether the state's interest in finality of convictions is a factor to be considered by a federal court in reviewing a twenty-year old state conviction.

CONCLUSION

The decision of the Ninth Circuit was erroneous as to the "cause" component of *Wainwright v. Sykes, supra,* and the court's failure to weigh the prejudice to Washington State caused by Myers' twenty-year delay in filing his habeas corpus petition. As such, a reversal is required.

DATED this 1st day of December, 1981.

Respectfully submitted,

KENNETH O. EIKENBERRY,
Attorney General,

EDWARD B. MACKIE,
Chief Deputy Attorney General,
Counsel of Record,

MICHAEL P. LYNCH,
Assistant Attorney General.

Appendix

APPENDIX 1

GEORGE E. MYERS,

Petitioner-Appellant,

v.

STATE OF WASHINGTON et al.,

Respondents-Appellees.

No. 80-3031.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 8, 1981.

Decided May 26, 1981.

Appeal from the United States District Court for the Eastern District of Washington.

Before PREGERSON, POOLE, and NORRIS, Circuit Judges.

PREGERSON, Circuit Judge:

George E. Myers appeals from the district court's denial of his petition, purusant to 28 U.S.C. § 2254, for habeas corpus relief. Appellant advances several challenges to his conviction of second-degree murder in a 1957 Washington state trial.

I.

On the morning of May 18, 1957, passers-by discovered the body of Sigurd Oliver lying in a ditch in King County, Washington. Two days later, Myers was arrested. After a three and one-half hour session of police interrogation, Myers signed a statement admitting that he had beaten Oliver with his fists and a heavy metal object and left him lying alongside the road. The next day, in a television broadcast, Myers repeated essentially the same confession to a television news reporter.

Myers was tried in September 1957. The statement he signed was admitted into evidence against him. Myers

testified at his trial, stating that he had beaten Oliver after Oliver had made a homosexual advance toward him. Myers was found guilty of murder in the second degree, and his conviction was affirmed on appeal. *State v. Myers*, 53 Wash.2d 446, 334 P.2d 536 (1959).

[1] Two decades after his trial, Myers petitioned the Washington Supreme Court for release from personal restraint,[1] raising five grounds for setting aside his conviction. These were that: (1) his signed confession was involuntary and thus inadmissible; (2) he had been prejudiced by inflammatory publicity during the trial; (3) the prosecution failed to disclose favorable material evidence before trial; (4) he was denied counsel during the pretrial television interview; and (5) the jury instructions unconstitutionally shifted to the defense the burden of persuasion as to the intent element of the offense. *Petition of Myers*, 91 Wash.2d 120, 587 P.2d 532 (1979).

Myers had not raised any of these contentions in his direct appeal. The Washington Supreme Court held that this procedural default barred Myers from relying on the first four grounds in his collateral attack on his murder conviction. As to the allegedly unconstitutional jury instructions, the court acknowledged that "a slightly different question is presented," 91 Wash.2d at 123, 587 P.2d at 533, since the controlling law had changed many years after Myers had been convicted. But the court concluded that "the interest of the state in achieving a final judgment not subject to the frustrations associated with retrial years after the original proceeding outweighs any interest in readjudicating convictions according to subsequently developed legal standards," and therefore held that "failure to identify errors at trial or prosecute them on appeal" foreclosed raising them for the first time on collateral attack. *Id.* at 125-26, 587 P.2d at 535.

[1]In 1976, the Washington Supreme Court promulgated new Rules of Appellate Procedure (RAP). RAP 16.3—16.15 created a new, unified procedure, called a "personal restraint petition," that superseded the writ of habeas corpus and the application for post-conviction relief. The principles applicable to habeas continue to guide Washington courts in considering personal restraint petitions. *Petition of Myers*, 91 Wash.2d 120, 121 n.1, 587 P.2d 532, 532 n.1 (1979).

In January 1979 Myers filed a section 2254 petition in the United States District Court for the Eastern District of Washington, raising the same five grounds rejected by the state court. The State moved for summary judgment, arguing that Myers was not "in custody" under the murder conviction,[2] that the delay in raising the issues barred relief, and that the allegations of error lacked merit. The district court granted the State's summary judgment motion, and Myers appealed.

II.

Our consideration of this appeal must begin with the Supreme Court's ruling in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). There a state prisoner sought habeas corpus, arguing that because he had not understood the *Miranda* warnings, it was error to admit certain inculpatory statements at his trial. No objection to admitting those statements had been made at the trial, and the Supreme Court held that this failure to comply with the state's contemporaneous-objection rule[3] was an independent and adequate state procedural ground sufficient to bar federal habeas review absent a showing of "cause" for the failure and actual "prejudice" to the petitioner from the alleged constitutional violation.

[2] Washington enforces a similar procedural rule on the appellate level: "issues which could have been raised on appeal but were not, may not be used as grounds for a collateral attack on a criminal judgment." *Petition of Myers*, 91 Wash.2d 120, 122, 587 P.2d 532, 533 (1979). We must decide whether appellant's failure to comply with this rule is an independent and adequate state procedural ground precluding federal habeas review. Under the "cause and prejudice" standard of *Sykes*, we believe that we are in fact precluded from considering the merits of all but one of appellant's contentions.

[3] (A) *The confession*: Appellant claims that his

[2]The State has abandoned this argument in the instant appeal.

[3]Florida's rule required motions to suppress a defendant's inculpatory statements to be made at trial or not at all. 433 U.S. at 86, 97 S.Ct. at 2506.

signed confession was involuntary. In 1957, when appellant was tried, it was already well-settled law that involuntary confessions could not be admitted into evidence, and that reviewing courts would independently scrutinize "the totality of the circumstances" surrounding a confession, *Fikes v. Alabama*, 352 U.S. 191, 197, 77 S.Ct. 281, 284, 1 L.Ed.2d 246 (1957), to determine whether the confession was "the product of sustained pressure by the police" that had "overborne" the defendant. *Watts v. Indiana*, 338 U.S. 49, 53, 69 S.Ct. 1347, 1349, 93 L.Ed. 1801 (1949).[4] Appellant has presented no explanation for his failure to raise the voluntariness issue on appeal, and has thus failed to supply the "cause" showing required by *Sykes*.

[4] (B) *Publicity during trial*: Appellant points to a newspaper article, appearing the evening after the first day of his trial, that described him as a "confessed slayer" and the victim as "father of seven children." Neither the "cause" nor the "prejudice" prong of *Sykes* is satisfied as to this ground for habeas.

Appellant cites four cases in his discussion of prejudicial publicity. Two of these were decided prior to his appeal. *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1958); *Griffin v. United States*, 295 F.2d 437 (3d Cir. 1924). No "cause" has been given why appellant did not raise the issue of prejudicial publicity on his appeal — a default all the more surprising because he did raise the issue at trial.

Nor has appellant demonstrated actual "prejudice" from the trial court's failure to grant a mistrial after a poll of the jury revealed that three jurors had seen the newspaper article. A news item publicizing in a brief and unsensational manner the fact that Myers had confessed could hardly have worked great prejudice to him when his

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[4] *See also Harris v. South Carolina*, 338 U.S. 68, 69 S.Ct. 1354, 93 L.Ed. 1815 (1949); *Turner v. Pennsylvania*, 338 U.S. 62, 69 S.Ct. 1352, 93 L.Ed. 1810 (1949); *Malinski v. New York*, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945); *Lisenba v. California*, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941); *Chambers v. Florida*, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940); *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936).

confession itself was admitted at trial and corroborated by his own testimony.

[5] (C) *Suppression of Evidence*: Appellant contends that the coroner's report, furnished to the defense before trial, did not indicate when the victim died. Only at trial, he says, did he learn that the coroner believed that the death occurred some two to three hours after the victim was beaten, not immediately afterwards (as appellant claims the police had told him).

We leave aside the question whether this course of events actually amounted to suppression of evidence.[5] What is decisive is that appellant has not made an adequate showing of "prejudice" from the alleged suppression. The assistant coroner who performed the autopsy on Sigurd Oliver testified at trial that he believed death had probably occurred between three and four A.M. Trial Transcript at 120. On cross-examination, appellant's counsel was able to convey his theory that Oliver's death could have resulted from being struck by an automobile sometime after the beating. *Id.* at 121-22. And the defense counsel was able to exploit the apparent time lapse between the beating and the death in his closing argument. *Id.* at 275-76. Appellant's only argument now is speculation that, had he known of the time-of-death findings even earlier, he could have exploited that time lapse more effectively. We do not believe that argument adequately demonstrates actual prejudice to appellant.

[6] (D) *Lack of counsel*: Appellant complains that he was not represented by counsel when he made inculpatory statements during a television interview broadcast the day after he signed his confession (and four months before trial). We will not dwell on the merits of ap-

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[5] The cases on which appellant relies all involved withholding by the prosecution of information that the defense had explicitly requested. *Moore v. Illinois*, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972) (items withheld despite request for all written statements police had taken from witnesses); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (accomplice's exculpatory pretrial statement withheld despite request for all of his statements); *United States v. Coppola*, 526 F.2d 764, 774-75 (5th Cir. 1975) (tardy production of information requested by defendant).

pellant's novel characterization of the television interview as "a public hearing and a significant stage in the process which ultimately led to petitioner's incarceration." We simply observe that appellant has not made out the showing of "prejudice" demanded by *Sykes* with respect to the interview. At most, that interview publicized the fact that appellant had confessed — but since the signed confession itself was introduced in evidence at trial, and was corroborated by appellant's own testimony, it is hard to see how he was prejudiced by the broadcast.

(E) *The jury instructions*: As the Washington Supreme Court recognized, appellant's challenge to the constitutionality of certain jury instructions given at his trial creates problems different from those raised by his other contentions. *Petition of Myers*, 91 Wash.2d at 123, 587 P.2d at 533 (1979). The contention that the jury instructions at appellant's murder trial violated due process is based on recent decisions invalidating instructions that shift to the defense the burden of persuasion as to any element of the crime charged. *Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *State v. Roberts*, 88 Wash.2d 337, 562 P.2d 1259 (1977). When Myers was tried for murder in 1957, such instructions were considered proper. Thus the due process contention now before us was not raised at the trial or on appeal.[6] Washington's procedural rule barring a criminal defendant from using an issue not raised on appeal as grounds for collaterally attacking a conviction thus precluded Myers from successfully challenging the jury instructions in the state personal restraint proceeding. Although willing to review on direct appeal constitutional issues not raised at trial, the Washington Supreme Court believed it inappropriate to waive its procedural rule "[w]hen the claimed error is raised by way of collateral attack on the judgment." *Petition of Myers*, 91 Wash.2d at 124, 587 P.2d at 534.

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[6]On appeal, Myers did attack two of the instructions, but on the entirely different ground that they constituted a comment on the evidence. *State v. Myers*, 53 Wash.2d 446, 334 P.2d 536 (1959).

We begin by noting that the procedural default involved in the instant case differs in an important respect from that in *Sykes*. Here we have a failure to raise on appeal a constitutional issue that had not yet been identified, not a failure to object at trial to an alleged error that should have been apparent at the time. Whether the rule announced in *Sykes* should extend to such a default is doubtful.

The *Sykes* opinion identified a number of important interests that would be advanced by requiring compliance with a state's contemporaneous-objection rule as a precondition to obtaining federal habeas relief. Such a requirement "enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest" and "enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question." 433 U.S. at 88, 97 S.Ct. at 2507. *Not* enforcing the contemporaneous-objection rule, the Court feared, "may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Id.* at 89, 97 S.Ct. at 2507. And insisting on contemporaneous objection is desirable because it "encourages the result that [state trial] proceedings be as free of error as possible." *Id.* at 90, 97 S.Ct. at 2508.

[7] None of these considerations has any force in dealing with a situation like the appellant's, where the alleged procedural default consists of failure to raise on appeal constitutional issues that were unknown at the time the appeal was taken. It may be perfectly reasonable to conclude, as the *Sykes* Court did, that "[i]f a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection." *Id.* But it is quite unreasonable to insist that where a criminal defendant does *not* believe the

trial court has violated his constitutional rights — and indeed would have no reason to believe so unless he were able to anticipate how constitutional law would evolve over the next twenty years — he must nevertheless object either at trial or on appeal. Nor is it plausible to fear "sandbagging" in a case where the defense attorney in preparing an appeal omits what appears at the time to be a futile constitutional argument. In such a situation, to enforce Washington's rule against raising on collateral attack issues not raised on direct appeal would, if it achieved anything at all, simply encourage defense attorneys to raise on appeal every conceivable constitutional challenge that might some day be accepted — and thus overload their briefs with unmeritorious issues.

Thus, the reasons given in *Sykes* for enforcing a state contemporaneous-objection rule presuppose that the defendant had reason to believe during the trial that the trial court had violated his rights. In this case the defendant had no reason at the time of trial to believe his rights had been violated by the jury instructions. Therefore, we have little trouble concluding that federal habeas review should be available.

Assuming, however, that the *Sykes* rule does apply to appellant's failure to raise his constitutional objection to the jury instructions on direct appeal, appellant has made out a showing of "cause" and "prejudice" sufficient to satisfy that rule and overcome the bar to federal habeas review. "Cause" for appellant's failure to raise his constitutional argument on direct appeal exists because that argument depends on changes in the prevailing law and presumptions and burdens of proof occurring many years after the appeal. The Sixth Circuit recently confronted the question whether the "cause" prong of *Sykes* was met where state decisional law on burdens of proof had changed after the habeas petitioner's trial. In answering affirmatively, the Sixth Circuit explained that "[a] defendant cannot be expected to predict a change in the interpretation of state law when the law is so well-established and there has been no hint of change." *Isaac v.*

Engle, No. 78-3488, slip op. at 6, ___ F.2d ___, at ___ (6th Cir. Dec. 12, 1980) (en banc) (plurality opinion).[7] By the same token, appellant in the instant case could not be expected to predict a change in settled federal constitutional law, and had adequate "cause" for not anticipating such a change on direct appeal.

The "prejudice" prong of *Sykes* is satisfied in this case because of the crucial role the challenged jury instructions could have played in securing appellant's conviction. The second-degree murder statute under which Myers was convicted made "a design to effect the death of the person killed or of another" an element of the crime. *State v. Myers*, 53 Wash.2d 446, 448, 334 P.2d 536, 538 (1959). Instruction No. 7 permitted the jury to presume "that the death of the deceased was designed by the defendant" if the defendant had killed the deceased by an act whose "natural and ordinary consequence * * * would be to produce death." Without this presumption, there was scant evidence of a "design to effect the death" of the victim.

Myers signed a statement after three and one-half hours of police interrogation. In that statement, which was placed in evidence at his trial, he admitted having struck the victim on the head with his fist and with a metal bar, but claimed: "I had no intention of killing this man when I left the Tavern with him and I don't know now why I really did kill him. I didn't think he was dead when I left him in the ditch." Trial Transcript at 133. On direct examination, Myers testified that the slain man had made a homosexual advance toward him, grabbing his head and "tr[ying] to pull me toward him by the hair," and that this had triggered the beating. *Id.* at 219-20. Asked on cross-examination "Why did you have to hit him?", Myers replied:

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[7] Although the opinion of the court in *Isaac* was that of only four of the ten en banc judges, Chief Judge Edwards explicitly joined that portion of the court's opinion dealing with "the cause and prejudice issues," slip op. at 12, at ___, and Judge Jones, in his separate concurrence, agreed that the defendant "had 'cause' not to object to the jury instructions at his trial" because he "neither knew nor could have known that the jury instructions * * * were improper under *Robinson*, decided two years after his trial." *Id.* at 15, at ___

"I was scared and I was mad. I don't know whether I was more scared or more mad." *Id.* at 227.

This evidence is consistent with a "design to effect the death of the person killed." It is equally consistent, however, with the absence of such a design — with the unthinking, half-enraged and half-frightened reaction of a young man who claimed to have previously been subjected to homosexual advances from other convicts in the state prison, Trial Transcript at 211, 224-25, and whom the prosecution itself sought to depict as abnormally sensitive to such advances. *Id.* at 224-25, 229-30. Because the evidence thus lent itself to such conflicting interpretations on the crucial issue of appellant's intent, the challenged instructions — creating the presumptions that the killing was "without excuse or justification" and that "the death of the deceased was designed by the defendant" — worked "prejudice" on appellant sufficient to meet the demands of *Wainwright v. Sykes.*[8]

We conclude that the appellant's failure to raise his constitutional objections to the jury instructions on direct appeal do not preclude federal habeas corpus review of those objections in the instant proceeding. Accordingly, we must consider whether there are other grounds sufficient to sustain the district court's entry of summary judgment in favor of the respondents.

III.

The district court did not state its basis for granting summary judgment, but respondents had presented that court with three arguments supporting their summary judgment motion: (1) that Myers is no longer "in custody" under the murder conviction; (2) that appellant's delay in raising the issues he now presents should preclude considering them; and (3) that appellant's contentions were without merit. On this appeal, the State has abandoned the first of these arguments.

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[8]We are not at this point addressing the question whether the contested instructions actually shift the burden of proof in violation of the due process clause. *See* Part III *infra*. We are concluding only that *if* they do so, appellant suffered actual prejudice from the error.

[8, 9] The delay argument presented to the district court is somewhat ambiguous; it is not clear whether respondents were actually invoking the rule of *Wainwright v. Sykes*. If they were, our discussion in Part II(E), *supra*, is a sufficient reply. If not, then respondents presumably relied — as they did explicitly in their brief on appeal — on Rule 9(a) of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254, which provides that:

> A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

This rule does not mandate dismissal of a tardy petition but leaves it within the court's discretion. Delay alone does not make dismissal proper — even a delay of forty-four years has been held insufficient to justify dismissing a habeas petition. *Hawkins v. Bennett*, 423 F.2d 948 (8th Cir. 1970).[9] Because the appellant's challenge to the jury instructions is based on recent changes in the controlling law that could not have been predicted at the time of his trial, it is clear that even if the State has been prejudiced,[10] appellant "could not have had knowledge" of the grounds for his petition "by the exercise of reasonable diligence" before the prejudice occurred. Consequently we find that dismissal of appellant's petition is not justified by Rule 9(a).

The State's final argument is that appellant's

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[9] *Hawkins* was a stronger case for dismissal than ours: not only was the delay in petitioning for habeas more than twice as long, but "each of the contentions raised by appellant was constitutionally protected at the time of his conviction." 423 F.2d at 951 n.4.

[10] We express no opinion as to whether the State actually *has* been prejudiced. Respondents, in their summary judgment motion, merely asserted in general terms that "any set of facts which could be marshalled now on retrial would bear only a shadow of the reliability they had when first presented." They offered no specific facts as to witnesses now unavailable, records now inaccessible, or other factors supporting their assertions.

contentions are without merit. Addressing this argument requires examining the substance of appellant's contention that the jury instructions given at his trial unconstitutionally shifted the burden of proof to the defense on the intent element of second-degree murder.

[10] As previously noted, the statute under which Myers was convicted made "a design to effect the death of the person killed or of another" an element of second-degree murder. *State v. Myers*, 53 Wash.2d 446, 448, 334 P.2d 536, 538 (1959). Myers argues that jury instructions numbers 5 and 7 shifted to the defendant the burden of disproving this element.[11] "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). The Supreme Court has applied this principle to strike down a state rule under which juries were instructed to presume that an intentional, unlawful killing was murder unless the defendant proved by a preponderance of the evidence that he had acted in the heat of passion on sudden provocation. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). The challenged Instruction No. 7 in the instant case, like the jury instructions in *Mullaney v. Wilbur*, placed on the defendant the burden of persuasion with respect to his intent in committing the fatal act. We can see no basis for distinguishing the two situations.

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[11]The instructions appellant challenges are:

[Instruction No. 5] Every killing of a human being is presumed in law to be without excuse or justification. Any matter of excuse or justification that may exist for such killing, if such killing you find to be a fact, is matter of defense and the state is not required to prove to you affirmatively that no such excuse or justification existed. It is required, however, that you be convinced, from all the facts and circumstances surrounding the transaction, beyond a reasonable doubt, that such killing was without justification, as the same has been defined to you in these instructions. [Trial Transcript at 240-41].

[Instruction No. 7] If the defendant is shown by the evidence beyond a reasonable doubt, to have killed the deceased by an act, the natural and ordinary consequences of which would be to

Moreover, while the Washington Supreme Court found it unnecessary to decide whether the instructions Myers attacks were actually unconstitutional,[12] we believe that it would have found the instructions invalid had it ruled on the issue. In *State v. Roberts*, 88 Wash.2d 337, 342, 562 P.2d 1259, 1262 (1977) (en banc), the Washington Supreme Court construed *Mullaney v. Wilbur* to prohibit the use in criminal cases of presumptions that shift to the defendant the burden of persuasion, as opposed to the burden of producing evidence, as to elements of the crime charged.[13] The instructions Myers challenges here create presumptions not limited to shifting the burden of producing evidence and would thus be struck down under the *Roberts* standard. The particular instruction at issue in *Roberts* created a presumption that defendant acted "with a design to effect the death" of the victim once it was proved that he had killed another and that the killing was neither justified nor excused. *Id.* at 343, 562 P.2d at 1262. The Washington court held this presumption unconstitutional because the inference "cannot be said to follow 'beyond a reasonable doubt.'" *Id.*[14] A fortiori, the presumption created by Instruction No. 7 in the instant case would be defective, since it permits the jury to

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produce death, then it will be presumed that the death of the deceased was designed by the defendant, unless the facts and circumstances of the killing, or the evidence, creates a reasonable doubt whether the killing was done purposely. [Trial Transcript at 243.]

[12]The court assumed, without deciding, that the challenged instructions were defective, and held only that the rule invalidating them would not be applied retroactively in a collateral proceeding. *Petition of Myers*, 91 Wash.2d 120, 123-24, 587 P.2d 532, 534 (1979).

[13]The burden of producing evidence on an issue is the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue. The burden of persuasion on an issue is the obligation of a party to establish by evidence a requisite degree of belief concerning the issue in the mind of the trier of fact. *See* J. P. McBaine, *California Evidence Manual* § 1413 (2d ed. 1960); *McCormick on Evidence* § 336 (2d ed. 1972); 9 *Wigmore on Evidence* §§ 2485, 2487 (3d ed. 1940).

[14]The Washington court read *Barnes v. United States*, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973), as requiring that the "presumed element must be shown to follow from the facts proven beyond a reasonable doubt 'in light of present-day experience.'" 88 Wash.2d at 343, 562 P.2d at 1262. We intimate no opinion as to whether this reading of *Barnes* is correct.

presume such a "design" from even fewer proven facts than did the *Roberts* instruction.[15]

[11] We conclude, therefore, not only that respondents have presented no grounds sufficient to sustain the district court's grant to them of summary judgment, but that Myers is correct on the merits in asserting that the jury instructions given at his trial violated the due process clause as interpreted in *Mullaney v. Wilbur*. Erroneous jury instructions will support a collateral attack on a criminal conviction if they so infect the entire trial that the conviction violates due process. *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977); *Quigg v. Crist*, 616 F.2d 1107, 1111 (9th Cir. 1980). We believe that this stringent requirement is satisfied here because the paucity of evidence on the crucial intent issue meant that the defective jury instructions may well have secured appellant's conviction, as discussed in Part II(E) *supra*. *See Tyler v. Phelps*, 622 F.2d 172, 176 (5th Cir. 1980) (*Henderson* standard met because "very little evidence to support [intent] other than the presumption" created by erroneous jury instructions).

Consequently, the judgment of the district court is reversed. On remand, appellant's petition will be held in abeyance for ninety days to allow the State to initiate a new trial if it so desires.

REVERSED AND REMANDED.

NORRIS, Circuit Judge, concurring:

As I see it, the pivotal issue in this case is whether Myers has made a sufficient showing of "cause" under *Wainwright v. Sykes* to overcome the bar created by his failure to object to the defective jury instruction in the state trial court or on direct appeal. While Myers' current constitutional claim may have been "on the frontier of the criminal law" at the time of his trial, the law of presumptions was, in my view, sufficiently well-established at that time that Myers could reasonably have believed that

[15] Instruction No. 7 bases the presumption on the mere fact of the killing, while the *Roberts* presumption rested on a killing not justified or excused.

raising such a claim would be futile. Accordingly, I conclude that Myers established adequate "cause" for his failure to object to the defective jury instruction. *See Isaac v. Engle*, slip op. at 6-7, ___ F.2d ___ at ___ - ___ (6th Cir. Dec. 12, 1980). A contrary result would, as Judge Pregerson noted, "simply encourage defense attorneys to raise on appeal every conceivable constitutional challenge that might some day be accepted — and thus overload their briefs with unmeritorious issues." Majority Opinion, slip op. at 2381, at ___.

POOLE, Circuit Judge, dissenting:

The majority opinion holds that the values underlying the rule established by the Supreme Court in *Wainwright v. Sykes* are not implicated by Myers' claim of error in certain of his jury instructions, and that therefore the *Sykes* rule does not apply to that claim. The majority further holds that, even if *Sykes* is applicable, its requirements are satisfied: in its view, Myers has made out a sufficient showing of "cause" and "prejudice" to overcome the *Sykes* bar to habeas review. From both holdings, I respectfully dissent.

I. *Applicability of Sykes to Myers' Claim*

Baldly stated, the majority's position is that where a constitutional claim "had not yet been identified" and was, in fact, "unknown" at the time of trial or direct appeal, the federal interests that prompted adoption of the *Sykes* rule are not involved, and that rule ought therefore not to be applied. The objection to this murky epistemology is that it is not at all clear what is meant by the word "unknown." If the majority truly means by this word to single out those constitutional arguments for which there is no record that they had yet been made or thought of, that is not the case before us. Although the state of Washington accepted such jury instructions as were given in this case at the time of Myers' trial, there was at that same time a significant controversy elsewhere as to the constitutionality of such instructions. *See, e.g., Annot.*, 162 A.L.R. 495, 500 (1946). Indeed, it would not overstate to say that this issue was clearly on the frontier of the criminal law of the time. To

suggest that Myers' current constitutional claim was truly "unknown" at the time of his trial simply mischaracterizes the facts.

If the point be pressed to further analysis, I suspect that what the majority really means by "unknown" is something like "unacceptable to that particular court at that particular time." If so, then the majority's formulation stands revealed as an exception to *Sykes* that will surely devour it. The majority has, in effect, absolved defense counsel of the need to establish at trial the basic record heretofore considered natural to professionalism by giving assurance that ripe objections on constitutional grounds need not be made where it seems they will be overruled in the forum, and that *Sykes* will not bar raising them in later habeas proceedings because it is sufficient that trial counsel did not have them in mind, or thought it pointless to give them voice. Such encouragement to "sandbagging" surely frustrates the principles set forth in *Sykes*.

Moreover, it should be remembered that the boundaries of constitutional rights have historically been redefined, patient mete and meter, largely by the efforts of diligent and thoughtful attorneys who search for and raise "new" but logical and reasonable extensions of previously established, or at least suggested, doctrines. This is important to the values we place on competence in advocacy in the larger aim for fair trial. The majority, it seems to me, ignores or denigrates these fundamental aspects of our legal system by the suggestion that it is unreasonable to expect the defense to raise objections at trial that are thoughtful and creative, rather than mere rote recitations of hornbook legal principles. The majority also takes too limited a view of the comity interests involved in this situation: unless the objection was truly so far ahead of its time that its conception would have been visionary, I think that the state trial court is entitled to an opportunity to consider it before it may provide the basis for reversal on federal habeas. Foresight of this level does not, as the majority seems to fear, accrue only to legal prophesy: it hallmarks also the able defender.

In sum, it is my opinion that the values underlying *Sykes* are clearly implicated in these circumstances, and that the majority opinion has dealt airily with those values. I would require Myers to satisfy the *Sykes* cause and predudice requirements before raising his claim in this habeas proceeding.

II. *The Sykes Requirements*

The majority offers an alternative basis for reversal in this case, perhaps reflecting uneasiness with its holding above. It holds that Myers has satisfied the *Sykes* cause and prejudice requirements. "Cause" exists for Myers' failure to raise his objection because, the assertion goes, the utility of any such objection would depend on changes in the prevailing law. I do not agree that this constitutes adequate cause under *Sykes*. The Supreme Court in that case sought to establish a rule that would ensure that all reasonable arguments be raised in the trial court. For the reasons given above, I believe that the issue Myers now brings could reasonably have been expected to be raised in the trial court. That the courts of the state had expressed their disinclination to sustain the objection can only serve to satisfy the cause requirement of *Sykes* if we propose henceforth, under today's convenient analysis, to except that requirement out of existence.

I would affirm the denial of the writ to Myers on the grounds indicated above.

APPENDIX 2

UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-3031

DC CV 79-13 WPC

Clerk's Stamp
Filed in the
U.S. District Court
Eastern District of Washington
Sept. 18, 1981

GEORGE E. MYERS,

Petitioner-Appellant.

VS.

STATE OF WASHINGTON, et al.,

Respondents-Appellees.

APPEAL from the United States District Court for the Eastern District of Washington (Spokane).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane).

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered May 26, 1981.

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-3031

ORDER

Clerk's Stamp
Filed in the
U.S. Court of Appeals
Sept. 8, 1981

GEORGE E. MYERS,

Petitioner-Appellant,

vs.

STATE OF WASHINGTON, et al.,

Respondents-Appellees.

Before: PREGERSON, POOLE, and NORRIS, Circuit Judges.

The panel in this matter as constituted above has voted to deny the petition for rehearing. Judges Pregerson and Norris voted to reject the suggestion for rehearing en banc and Judge Poole voted to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-79-13

ORDER

Clerk's Stamp
Filed in the
U.S. District Court
Eastern District of Washington
October 4, 1979

GEORGE E. MYERS,

Petitioner,

vs.

STATE OF WASHINGTON, et al.,

Respondents.

IT IS ORDERED:

Respondents' motion for summary judgment is in all respects granted. The Clerk will enter judgment accordingly denying all relief requested.

DATED October 1, 1979.

/s/_____
United States District Judge

APPENDIX 5

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WASHINGTON

CIVIL ACTION FILE NO. C-79-13

JUDGMENT

Clerk's Stamp
Filed in the
U.S. District Court
Eastern District of Washington
October 4, 1979

GEORGE E. MYERS,

Petitioner,

VS.

STATE OF WASHINGTON, D.S.H.S.;
JAMES SPALDING, Warden and
ATTORNEY GENERAL OF THE
STATE OF WASHINGTON,

Respondents.

This action came on before the Court, Honorable William P. Copple, United States District Judge, presiding, and the issues having been duly reviewed and a decision having been duly rendered.

It is Ordered and Adjudged that the Respondents' motion for summary judgment is granted in all respects; and all relief requested is denied.

Dated at Spokane, this 4th day of October, 1979.

/s/_____
Clerk of Court

APPENDIX 6

RULE 16.3 PERSONAL RESTRAINT PETITION—GENERALLY

(a) Habeas Corpus and Post-Conviction Relief. Rules 16.3 through 16.15 establish a single procedure for original proceedings in the appellate court to obtain relief formerly available by a petition for writ of habeas corpus or by an application for post-conviction relief.

(b) Former Procedure Superseded. The procedure established by Rules 16.3 through 16.15 for a personal restraint petition supersedes the appellate procedure formerly available for a petition for writ of habeas corpus and for an application for post-conviction relief, unless one of these rules specifically indicates to the contrary. These rules do not supersede and do not apply to habeas corpus proceedings initiated in the superior court.

(c) Original Appellate Court Jurisdiction. The Supreme Court and the Court of Appeals have original concurrent jurisdiction in personal restraint petition proceedings. The Supreme Court will ordinarily exercise its jurisdiction by transferring the petition to the Court of Appeals.

RULE 16.4 PERSONAL RESTRAINT PETITION—GROUNDS FOR REMEDY

(a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioner's restraint is unlawful for one or more of the reasons defined in section (c).

(b) Restraint. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

(c) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons:

(1) the decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or

(2) the conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the constitution or laws of the State of Washington; or

(3) material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or

(4) there has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or

(6) the conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the constitution or laws of the State of Washington; or

(7) other grounds exist to challenge the legality of the restraint of petitioner.

(d) Restrictions. The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

[Amended July 2, 1976.]

RULE 16.5 PERSONAL RESTRAINT PETITION—WHERE TO SEEK RELIEF

(a) Court of Appeals. A personal restraint petition should be filed in the Court of Appeals.

(b) Supreme Court. If a personal restraint petition is filed in the Supreme Court, the Supreme Court will ordinarily transfer the petition to the Court of Appeals.

RULE 16.6 PERSONAL RESTRAINT PETITION—PARTIES

(a) Parties. If petitioner is under a restraint imposed by the state or local government, the petition should be captioned only with the name of the petitioner. If petitioner is not under a restraint imposed by the state or local government, the petition should be captioned with the name of the petitioner and the name of the person or agency restraining petitioner's liberty, as respondent. The petition may be brought by the person who is under a restraint or in the person's name by that person's guardian, conservator, parent, or attorney.

(b) Respondent—Restraint by Government. If petitioner is under a restraint imposed by the state or local government, the officer or agency responsible for the proceeding against petitioner at the time petitioner claims the proceding was defective or improper shall respond to the petition. If there are two or more proper respondents, each shall serve and file a separate response unless they agree to joint representation and notify the appellate court and the petitioner of that agreement.

(c) Change of Respondent. If the petitioner is under a restraint imposed by the state or local government, the appellate court may on its own initiative or on motion substitute the proper respondent, and the clerk of the court will notify substituted respondent.

RULE 16.7 PERSONAL RESTRAINT PETITION—FORM OF PETITION

(a) Generally. Under the titles indicated, the petition should set forth:

(1) *Status of Petitioner.* The restraint on petitioner; the place where petitioner is held in custody, if confined; the judgment, sentence, or other order or authority upon which petitioner's restraint is based, identified by date of entry, court, and cause number; any appeals taken from that judgment, sentence or order; and a statement of each other petition filed with regard to the same allegedly unlawful restraint, identified by the date filed, the court, the disposition made by the court, and the date of disposition.

(2) *Grounds for Relief.* A statement of (i) the facts upon which the claim of unlawful restraint of petitioners is based and the evidence available to support the factual allegations, (ii) why other remedies are inadequate, and (iii) why the petitioner's restraint is unlawful for one or more of the reasons specified in Rule 16.4(c). Legal argument and authorities may be included in the petition, or submitted in a separate brief as provided in Rule 16.10(a).

(3) *Statement of Finances.* If petitioner is unable to pay the filing fee or fees of counsel, a request should be included for waiver of the filing fee and for the appointment of counsel at public expense. The request should be supported by a statement of petitioner's total assets and liabilities.

(4) *Request for Relief.* The relief petitioner wants.

(5) *Oath.* If a notary is available, the petition must be signed by the petitioner or his attorney and verified substantially as follows:

> After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.
>
> [*or,*]
>
> After being first duly sworn, on oath, I depose and say: That I am the attorney for the petitioner, that I have read the petition, know its contents, and I believe the petition is true.
>
> [*Signature*]

Subscribed and sworn to before me this _____ day of _____, 19__.

Notary Public in and for the State of Washington, residing at _____

If a notary is not available, the petition must be subscribed by the petitioner or his attorney substantially as follows:

I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct.

Dated This _____ day of _____, 19__.

[*Signature*]

If a notary is available and a petition is filed which is not verified, the appellate court will return the petition for verified signature and advise the petitioner's custodian to make a notary available.

(b) Standard Form. The clerk of the appellate court will make the standard form of petition available to persons who are confined in state institutions and to others who may request the form.

RULE 16.8 PERSONAL RESTRAINT PETITION—FILING AND SERVICE

(a) Filing Fee. A personal restraint petition will be filed by the clerk of the appellate court only if the statutory filing fee is paid, unless the appellate court determines that the petitioner is unable to pay the filing fee. The statute requiring payment of a fee for filing a petition for writ of habeas corpus is controlling.

(b) Filing in Court of Appeals. A personal restraint petition filed in the Court of Appeals must be filed in the division which includes the superior court entering the decision on the basis of which petitioner is held in custody or, if petitioner is not being held in custody on the basis of a decision, in the division in which the petitioner is located.

(c) Service of Petition. If petitioner's restraint is imposed by the state or local government, the clerk of the

appellate court will reproduce a copy of the petition and serve the petition on the officer or agency under a duty to respond to the petition. If petitioner's restraint is imposed by a person or agency other than the state or local government, the petitioner must prepare and serve a copy of the petition on the proper respondent.

RULE 16.9 PERSONAL RESTRAINT PETITION—RESPONSE TO PETITION

The respondent must, within 20 days after the petition is served, unless the time is extended by the commissioner or clerk for good cause shown, serve and file a response to the petition. The response must answer the allegations in the petition. The response must state the authority for the restraint of petitioner by respondent and, if the authority is in writing, include a conformed copy of the writing. If an allegation in the petition can be answered by reference to a record of another proceeding, the response should so indicate and include a copy of those parts of the record which are relevant. Respondent should also identify in the response all material disputed questions of fact.

RULE 16.10 PERSONAL RESTRAINT PETITION—BRIEFS

(a) Briefs Allowed. The following briefs may be, but need not be, filed:

(1) *Petitioner's Opening Brief.* Petitioner's opening brief, which should be filed with the petition.

(2) *Petitioner's Reply Brief.* Petitioner's reply brief, which should be filed within 20 days after the answering brief is served on petitioner. If the brief is mailed, it must be mailed within 17 days after the answering brief is served on petitioner.

(b) Brief Required. Respondent must file an answering brief within the time the response must be filed.

(c) Briefs at Request of Appellate Court. The appellate court may call for additional briefs at any stage of the consideration of the petition.

(d) Content and Style of Briefs. The content and style of briefs is governed by Rules 10.3 and 10.4.

(e) Reproduction and Service of Briefs. Briefs must be filed with the clerk of the appellate court. Briefs will be reproduced and served by the clerk in accordance with Rule 10.5.

RULE 16.11 PERSONAL RESTRAINT PETITION—CONSIDERATION OF PETITION

(a) Generally. The Chief Judge will consider the petition promptly after the time has expired to file petitioner's reply brief. The Chief Judge determines at the initial consideration if the petition will be retained by the appellate court for determination on the merits or transferred to a superior court for determination on the merits or for a reference hearing.

(b) Determination by Appellate Court. The Chief Judge determines at the initial consideration of the petition the steps necessary to properly decide on the merits the issues raised by the petition. If the issues presented are frivolous, the Chief Judge will dismiss the petition. If the petition is not frivolous and can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits. If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing. The Chief Judge may enter other orders necessary to obtain a prompt determination of the petition on the merits.

(c) Oral Argument. Decisions of the Chief Judge will be made without oral argument. If a petition is to be decided on the merits by a panel of judges, the appellate court clerk will set the petition for consideration by the panel of judges, with or without oral arguments. If oral argument is directed, the clerk will notify the parties of the date set for oral argument.

[Amended Jan. 1, 1977.]

RULE 16.12 PERSONAL RESTRAINT PETITION—SUPERIOR COURT HEARING

If the appellate court transfers the petition to a superior court, the transfer will be to the superior court for the county in which the decision was made resulting in the restraint of petitioner or, if petitioner is not being restrained on the basis of a decision, in the superior court in the county in which petitioner is located. If the respondent is represented by the attorney general, the prosecuting attorney, or a municipal attorney, respondent must take steps to obtain a prompt evidentiary hearing and must serve notice of the date set for hearing on all other parties. The parties, on motion and for good cause shown, will be granted reasonable pretrial discovery. Each party has the right to subpoena witnesses. The hearing shall be held before a judge who was not involved in the challenged proceeding. The petitioner has the right to be present at the hearing and the right to cross-examine adverse witnesses. The rules of evidence apply at the hearing. Upon the conclusion of the hearing, if the case has been transferred for a reference hearing the superior court shall enter findings of fact and have the findings and all appellate court files forwarded to the appellate court. Upon the conclusion of the hearing if the case has been transferred for a determination on the merits, the superior court shall enter findings of fact and conclusions of law and an order deciding the petition.

[Amended Jan. 1, 1977.]

RULE 16.13 PERSONAL RESTRAINT PETITION—PROCEDURE AFTER REFERENCE HEARING

After a reference hearing and the findings of fact and appellate court files have been returned to the appellate court, the Chief Judge will dismiss the petition if the issues presented are frivolous. If the petition is not frivolous, the Chief Judge will refer the petition to a panel of judges for determination on the merits. The appellate court may, on motion of a party, order the preparation of and transmittal

to the appellate court of a part or all of the record of the reference proceeding. The appellate court order will define at whose expense the record is prepared. Oral argument is governed by Rule 16.11(c).

[Amended July 2, 1976.]

RULE 16.14 PERSONAL RESTRAINT PETITION—APPELLATE REVIEW

(a) Decision Whether To Transfer. A decision to transfer a petition to a superior court for a hearing or to retain the petition for determination by the appellate court is not subject to review by the Supreme Court.

(b) Decision of Superior Court. A decision of a superior court in a personal restraint proceeding transferred to that court for a determination on the merits is subject to review in the same manner and under the same procedure as any other trial court decision.

(c) Other Decisions. If the petition is dismissed by the Chief Judge or decided by the Court of Appeals on the merits, the decision is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in Rule 13.5(a), (b), and (c).

[Amended Jan. 1, 1977.]

RULE 16.15 PERSONAL RESTRAINT PETITION—SUPPLEMENTAL PROVISIONS

(a) Motion. The procedure for and form of a motion is as provided in Title 17, except that a motion by the petitioner must be verified in the same manner as a petition. Motions will ordinarily be considered without oral argument.

(b) Release by Appellate Court of Person in Custody. The appellate court may release a petitioner on bail or personal recognizance before deciding the petition, if release prevents further unlawful confinement and it is unjust to delay the petitioner's release until the petition is determined. The appellate court or the superior court in

its decision on the merits, or by separate order after a decision on the merits, may release a petitioner on bail or on personal recognizance. The appellate court may direct the release of petitioner with the conditions of release to be determined by a trial court.

(c) Oral Argument. Except as otherwise provided in Rule 16.11(c), the procedure for oral argument is governed by Title 11.

(d) Disposition of Petition. The petition will be determined by the appellate court by written opinion or order briefly stating the reasons for the determination.

(e) Costs. Costs are awarded as provided in Title 14.

(f) Indigency—Superior Court Determination. The provisions of CrR 3.1 apply to a personal restraint petition transferred to a superior court. If any of the petitioner's expenses incurred in the superior court are to be paid with public funds, the expenses shall be paid with funds appropriated by the county in which the superior court is located.

(g) Indigency—Appellate Court Proceeding. If the restraint is imposed by the state or local government, and if the appellate court determines that petitioner is indigent, the court may provide for the appointment of counsel at public expense for services in the appellate court, order waiver of charges for reproducing briefs and motions, provide for the preparation of the record of prior proceedings and provide for the payment of such other expenses as may be necessary to consider the petition in the appellate court. Invoices for expenses of an indigent person in the appellate court must be submitted to the appellate court which decided the petition in the form and manner provided in Rule 15.4, except that a trial court order of indigency is not required and the invoice must be submitted within 45 days after the appellate court decision terminating the proceeding is filed. If a petitioner who claims to be indigent is in the custody of an agency of the Department of Social and Health Services, the clerk of the appellate court will obtain a statement of petitioner's

known assets from the superintendent of the institution where petitioner is confined. Statutes providing for payment of expenses with public funds are not superseded.

[Amended Jan. 1, 1977.]

Opposition

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No. 81-1056

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF WASHINGTON,
Petitioner,

vs.

GEORGE E. MYERS,
Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

John B. Midgley
Counsel of Record

109 Prefontaine Pl.S.
Seattle, WA 98104
(206) 464-5911

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COUNTERSTATEMENT OF THE CASE

Facts additional to those advanced by petitioner State of Washington ("the state" hereinafter), and a disagreement over certain facts, are presented below. Most of the facts are presented in the Court of Appeals' opinion (Myers v. Washington, 646 F.2d 355 (9th Cir.1981)), and in the Petition For Writ of Certiorari ("Petition" hereinafter), and will not be repeated here.

Respondent George E. Myers ("Mr. Myers" hereinafter) appealed his conviction of second degree murder to the Washington Supreme Court. His assignment of error No. 1 on that appeal was a challenge to two jury instructions, one of which (No. 7) was also challenged in the present proceedings. See Petition at 3. The Brief of Appellant, written in 1958, shows that

in substance Mr. Myers made the challenge to Instruction No. 7 on direct appeal which he later pressed in post-conviction proceedings.[1] See, for elaboration and quotation from the brief on direct appeal, Argument § I, below. Mr. Myers thus disputes the state's contention that the challenge on direct appeal was on an "entirely different ground." Petition at 3.

The Washington Supreme Court, in February of 1977, reversed a second degree murder conviction because certain jury instructions violated the rule of Mullaney v. Wilbur, 421 U.S. 684 (1975). State v. Roberts, 88 Wn. 2d 337, 562 P.2d 1259 (1977). This

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[1]The entire Brief of Appellant is in the record in the Court of Appeals as Exhibit 3 to CR (Clerk's Record) 3.

Court, in June of 1977, held that Mullaney v. Wilbur is to be given full retroactive effect. Hankerson v. North Carolina, 432 U.S. 233 (1977).

Mr. Myers, early in 1978, filed a Personal Restraint Petition in state court in Washington, seeking a new trial on the basis of, inter alia, a retroactive application of Mullaney v. Wilbur and State v. Roberts to two jury instructions in his case. [2] This petition was ultimately denied by the Washington Supreme Court in December of 1978. In re Myers, 91 Wn.2d 120, 587 P.2d 532 (1978), cert. denied sub. nom. Myers v. Washington, 442 U.S 912 (1979).

Mr. Myers filed his petition under 28 U.S.C. § 2254 on January 23, 1979

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[2] As stated above, one of these instructions was challenged on direct appeal.

in the United States District Court for the Eastern District of Washington.

ARGUMENT

I. NO QUESTION OF "CAUSE" UNDER WAINWRIGHT V. SYKES FOR FAILURE TO RAISE AN ISSUE AT AN EARLIER STAGE IS PRESENTED BECAUSE MR. MYERS DID RAISE IN HIS DIRECT APPEAL THE ISSUE LATER DETERMINED TO JUSTIFY HABEAS RELIEF.

The state's main arguments for certiorari on the question of "cause" under Wainwright v. Sykes, 433 U.S. 72 (1977), depend on an assumption that Mr. Myers failed to raise on direct appeal the issue on which he was later granted habeas corpus relief. Petition at 3,7. As shown here, this assumption is unwarranted and Wainwright therefore is not applicable to this case.

Wainwright v. Sykes establishes a "cause/prejudice" test for determining whether at least some state

procedural defaults will preclude consideration of certain federal claims in federal habeas corpus. The state here claims that Wainwright should apply to all of Mr. Myers' claims and that no cause should be found. However, Wainwright is obviously not even arguably in issue unless the state can establish that a state procedural default occurred. The state cannot establish such a default in this case.

In Washington, a constitutional claim may be raised for the first time on direct appeal, and if such a claim was raised on direct appeal it will be heard on the merits in a subsequent post-conviction petition. In re Myers, supra, 91 Wn. 2d at 124-126; In re Lee, 95 Wn. 2d 357, 623 P.2d 687 (1980) (petition granted as to the only one of five petitioners who had raised the same issue on appeal); In re Gilbert,

27 Wn. App. 286, 617 P.2d 455 (1980) (second degree murder conviction reversed on post-conviction petition on authority of In re Myers, because issue was raised on appeal). Therefore, if it can be fairly said that Mr. Myers did raise on appeal the issue on which he was granted habeas relief, there could be no finding of procedural default, Wainwright would have no application, and certiorari should not be granted.

The content of the Brief of Appellant filed in Mr. Myers' direct appeal shows that the substance of the issue later raised in these proceedings was raised in that appeal. The entire brief is in the record below as Exhibit C to CR (Clerk's Record) 3. Assignment of Error No. 1 in that Brief challenged Instructions No. 6 and 7, which read as follows:

"The Court instructs the jury that the law presumes that every man intends the natural and probable consequences of his own acts. It is not necessary to establish intent by direct and positive evidence but intent may be established by inference and in the same way as any other fact by taking into consideration the acts of the parties and all the facts and circumstances of the case.

'Intent' is a mental condition or process and may be shown by direct proof or may be derived from and established by the attendant facts and circumstances as shown by the evidence. In determining the question of the intent of the defendant at the time of the killing herein alleged, if you find from the evidence that the defendant committed such killing, you may take into consideration the nature and character of the weapon or instrument used, if any; the manner in which such conduct of the defendant, together with all the other facts and circumstances shown by the evidence, and from all these,

> determine the intent of the defendant in this case." (Instruction No. 6).
>
> "If the defendant is shown by the evidence beyond a reasonable doubt, to have killed the deceased by an act, the natural and ordinary consequence of which would be to produce death, then it will be presumed that the death of the deceased was designed by the defendant, unless the facts and circumstances of the killing, or the evidence, creates a reasonable doubt whether the killing was done purposely." (Instruction No. 7).

Instruction No. 7 is one of the two instructions challenged in the present case and is the one which the Court of Appeals specifically identified as violative of Mullaney v. Wilbur. See Myers v. Washington, supra, 646 F.2d at 362. Instruction No. 6, which was not challenged in the present case, is plainly unconstitutional

under Sandstrom v. Montana, 442 U.S. 510 (1979) and State v. Caldwell, 94 Wn.2d 614, 618 P.2d 508 (1980) (holding unconstitutional under Sandstrom an instruction identical to the first paragraph of Instruction No. 6).[3]

Mr. Myers' Brief of Appellant included language fleshing out his challenge to the instructions. The Brief at page 7 states:

> Let us now turn our attention to the content of the two instructions under consideration. Instruction No. 6 advises the jury that the law presumes that every man intends the natural and probable consequences of his own acts. Instruction No. 7

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[3]Mr. Myers has raised in state court a claim that his challenge to Instruction No. 6 on direct appeal entitles him to relief under Sandstrom and State v. Caldwell. See Petition For Writs of Habeas Corpus in King County Cause No. 81-2-04207-4, appended to the state's Petition For Rehearing in the Court of Appeals.

advises the jury that if the natural and ordinary consequences of the act under consideration would be to produce death, then the jury shall presume that the death of the deceased was designed by the defendant. Certainly instruction No. 6 goes on to tell the jury that intent may be established by inference and in the same way as any other fact, but it is quite different to tell the jury that the necessary element of intent can ever be presumed. Certainly the matter of intent can never be proven by direct evidence and thus quite obviously intent may be inferred from facts which are in evidence. However, intent can never and should never be presumed; the law should never require an inference to be drawn with regard to the matter of intent. It is for the jury to draw the inferences from the facts and not for the court to advise the jury that the law compels them to draw any kind of an inference

from any kind of fact.

The Brief then continues, at pages 11-13:

> All of the foregoing discussions concerning the federal decisions and the state court decision are equally, if not more so, applicable to the instant situation. Here we are considering a charge of murder in the second degree, a crime which most certainly requires a specific intent. The jury is not simply told that intent is a matter to be determined by reasonable inferences which they can draw from facts which are proven in evidence, but instead is told that they may presume this specific intent from the acts performed by the appellant and further that if they believe that the natural and ordinary consequence of those acts would be to produce death, then they may presume that the death of the deceased was designed by the appellant. What occurs when such instructions are given to a jury is simply that the court is taking into its own

hands certain matters of fact and is advising the jury that they must infer certain conclusions if they find certain facts to exist. It is one thing to advise the jury that intent may be inferred from facts proven in evidence, and quite another thing to tell a jury that they must infer a specific intent to design the death of another because they find certain facts do exist.

The point is that just because intent can never be established by direct evidence, it still must be established from direct evidence and reasonable inferences therefrom. These inferences are matters which the jury must determine and they must not be compelled to draw certain inferences by virtue of instructions of the court requiring them so to do. We are herein considering a very basic area involving the proper functions of both the trial court and the trial jury, and we cannot be true to the constitutional requirements set forth in Article IV, Section 16 of the State Constitution, if

> we permit the trial court to enter into the area of factual consideration. It is as different as night and day to advise a jury that they must infer (presume) a defendant to be innocent until proven guilty beyond a reasonable doubt and, on the other hand to advise a jury that they must infer (presume) the appellant to have specifically designed the death of the deceased upon the proof of certain facts. As the United States Supreme Court said in the Morrissette case, supra [Morrisette v. United States, 342 U.S. 246 (1952)], "where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury... It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act."

[Emphasis in last paragraph added; other emphasis in original.]

The above language shows that Mr. Myers attacked, in his 1958 appellate brief, the shift to him of the burden of persuasion on the element of intent. This is the Mullaney defect on which he was granted relief by the Court of Appeals. In addition, Mr. Myers' counsel even cited Morrissette v. United States, 342 U.S. 246 (1952), a "conclusive presumption" case which was relied upon by this Court in holding unconstitutional the Montana instruction in Sandstrom. It is apparent that the issue ultimately raised in habeas had been raised on direct appeal.

It is true that Mr. Myers' Brief of Appellant discusses Instructions 6 and 7 partially in terms of a "comment on the evidence". See Petition at 3 and above quotations from the

the Brief. However, it is equally true that the substance of the challenge is the same as the challenge raised by Mr. Myers beginning with his Personal Restraint Petition in state court and culminating in these proceedings.[4]

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[4]Mr. Myers has tried to inform every court to which post-conviction claims have been addressed of his belief that he did raise the issue on direct appeal. He moved for reconsideration on this ground in the Washington Supreme Court; that court modified its opinion. See ER (Excerpt of Record) 209 in the Court of Appeals. He also brought this contention to the attention of the District Court and the Court of Appeals in this case. Court of Appeals Record CR 3 at 17 and Exhibit C; Petitioner-Appellant's Opening Brief in the Court of Appeals at 10-11. This issue was also raised before this Court in Mr. Myers' pro se request for Certiorari. Petition For Writ of Certiorari in Myers v. Washington, No. 78-6491, at 16-19.

The Court of Appeals apparently relied on the state court's opinion on direct appeal, and found that the Mullaney issue had not been raised in that appeal, 646 F.2d at 359, n.6. With all respect to the Court of Appeals it must be noted that the question of what was raised by a habeas petitioner in state court must be

Since Mr. Myers must be fairly said to have raised on direct appeal the issue on which he later prevailed in habeas corpus, the Court of Appeals need not have reached questions of "cause" under Wainwright v. Sykes. More pertinently here, since the issue was so raised, no questions under Wainwright are presented on the facts of this case. The Petition For Writ of Certiorari should be denied on the "cause" question.

II. EVEN IF IT COULD BE SAID THAT MR. MYERS DID NOT RAISE THE ISSUE OF THE UNCONSTITUTIONAL INSTRUCTION ON DIRECT APPEAL, NO ISSUE OF "CAUSE" UNDER WAINWRIGHT V. SYKES IS PRESENTED.

4(cont.)
determined from the petitioner's brief in state court, not necessarily what is in a state court opinion. Smith v. Digmon, 434 U.S. 332 (1978). Examination of the Brief of Appellant in the present case shows that the issue was raised.

Mr. Myers did raise in his direct appeal the issue on which he ultimately prevailed in the Court of Appeals, thus precluding application of Wainwright v. Sykes to this case. See Argument § I, above. However, even assuming arguendo that Mr. Myers had not raised the issue on direct appeal, Wainwright would have no application to this case. Wainwright is not implicated because the Washington Supreme Court decided the dispositive issue in Mr. Myers' case on federal substantive, not state procedural, grounds. Moreover, even if the state court's decision on this issue could be seen as a procedural one, Wainwright would have no application because, as a matter of federal law, Washington's attempt to preclude a substantive hearing on this issue was inadequate. This case thus does not, as urged by

the state, present issues like those in Engle v. Isaac, Supreme Court No. 80-1430, and certiorari should not be granted.

A. The State Court Decided On The Merits The Federal Constitutional Issue On Which Mr. Myers Was Granted Federal Habeas Corpus Relief.

The Wainwright v. Sykes "cause/prejudice" test applies only to cases in which state courts have refused to hear a habeas petitioner's federal constitutional claims on procedural grounds; federal habeas courts are in no way precluded from hearing cases which have been decided by state courts on the merits of federal constitutional claims. Wainwright v. Sykes, supra, 433 U.S. at 87. A federal court reviewing a state's claims of procedural default must determine whether the state has in fact refused to hear

federal constitutional issues on state procedural grounds. Ulster County Court v. Allen, 442 U.S. 140 (1979). Where the state court has denied a petitioner's federal constitutional claims on the merits, federal courts do not show disrespect for valid state procedural rules by themselves determining such claims. Ibid.

The Washington Supreme Court decided on the merits Mr. Myers' claim that Mullaney v. Wilbur should be retroactively applied. Mr. Myers presented five federal constitutional claims to the state courts. Four of these claims were decided on the ground that issues which could reasonably have been raised on direct appeal could not be raised in collateral proceedings. In re Myers, supra, 91 Wn.2d at 121-123. The fifth, the issue of retrospective application of Mullaney v. Wilbur and its state

counterpart, presented a "slightly" different question" (Id.at 123):

> Assuming the challenged instructions in the present case are defective under Roberts and Mullaney, the question is whether this new rule should be applied retroactively to this collateral review proceeding.

Id. at 123-124. The Washington court then applied a balancing test to determine the issue of retroactivity and held that

> the negative effect on the administration of justice outweighs the interest of a defendant in having his guilt redetermined in accordance with subsequent decisions of this court or the United States Supreme Court.

Id. at 124. After thus determining the retroactivity issue, the court elaborated:

> We find that the interest of the state in achieving a final judgment not

> subject to the frustrations associated with retrial years after the original proceeding outweighs any interest in readjudicating convictions according to subsequently developed legal standards. Executive clemency and the parole system are available for those cases that are particularly deserving. Accordingly we hold that the general rule -- i.e., the failure to identify errors at trial or prosecute them on appeal precludes reliance thereon in subsequent proceedings--applies to alleged errors raised for the first time on collateral attack.

Id. at 125-126.

The Washington Supreme Court, in two subsequent opinions, both authored by Justice Hicks, who wrote In re Myers, has conclusively demonstrated that the retroactivity issue was decided on the merits. In In re Lee, 95 Wn.2d 357, 362, 623 P.2d 687 (1980), the Myers holding was characterized as follows:

> All of the grounds urged, except one, could reasonably have been raised by Myers on appeal, if any were seriously regarded. They were not. The one exception was a change in this state's law of presumptions brought about by Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975) and State v. Roberts, 88 Wn.2d 337, 562 P.2d 1259 (1977). Myers claimed the benefit of retroactive application of the new constitutional rule as applied to presumptions. His petition was denied. We did not reach the merits of those issues which could reasonably have been raised on appeal but were not, and the retroactivity issue was decided adversely to Myers.

[Emphasis added.] Similarly, in In re Haynes, 95 Wn.2d 648, 651,628 P.2d 809 (1981), the Washington Supreme Court said:

> The Myers rule requires that those issues, constitutional or noncon-

> stitutional, which were known or could have been known yet were not raised at trial nor on direct appeal, may not be raised on collateral attack. Those constitutional interpretations not yet articulated in decisional law, and which could not have been anticipated, will be considered on collateral attack, subject to our strong public policy interest in the finality of judgments and the avoidance of later and inevitably less reliable criminal trials.

[Emphasis added.]

The state also asserted, in the Court of Appeals in this case, that In re Myers was a decision on the merits. In its Petition For Rehearing in the Court of Appeals, dated June 19, 1981, the state asserted at pages 3-4:

> The Haynes decision provides significant guidance of what is and has been the scope of review regarding constitutional issues not raised on direct appeal. Washington

State does not have an absolute procedural bar to constitutional issues which were not raised on direct appeal. Rather, when considering retroactive constitutional issues in a personal restraint petition, the Washington State court will balance the interest in error-free trials against the interest in finality of judgments with respect to their effects upon the truth-finding process. In re Haynes, supra. In other words, even though an issue is not raised on direct appeal, the Washington State courts will consider the facts and law surrounding the particular issue against the state's interest in finality of judgments and the effect of retrial upon the truth-finding process. This balancing test was applied when the petitioner presented his claims to the Washington State Supreme Court. In re Myers, supra.

Based upon the Washington State Supreme Court's review, on the merits, of petitioner's claims, the latter court determined that the general rule of not considering issues

> not raised on direct appeal would be applied in the petitioner's case, and not the exception. Again, respondents would emphasize that this determination was made by the state court only after the aforementioned balancing test had been carefully applied.

[Emphasis in original.]

These materials show that the Washington Supreme Court decided the retroactivity issue on the merits, not on any basis required by Washington procedural rules. The state court sought to deny retrospective application to Mullaney based upon a balancing test employing impact on the administration of justice as a balancing factor. This is exactly what the North Carolina Supreme Court had done in Hankerson v. North Carolina, supra, and is exactly what this Court rejected in granting Mullaney complete retroactive effect. As stated initially

in Williams v. United States, 401 U.S. 646, 653 (1971), and quoted and followed in Hankerson:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

432 U.S. at 241. The retroactive impact of Mullaney thus may not be avoided on the grounds advanced in In re Myers.

Since the state decided on the merits the issue on which Mr. Myers prevailed in the Court of Appeals, and since there is no procedural bar in

Washington to raising retroactivity claims on collateral attack, no issue under Wainwright v. Sykes is even presented in this case. The Ninth Circuit need not have reached Wainwright issues, and this Court should not grant certiorari to determine issues which would not be reached.

B. Even If The State Court Could Be Said To Have Decided The Crucial Issue On A Procedural Ground, Such Asserted Ground Would Not Be Adequate To Insulate Mr. Myers' Conviction From Federal Review.

The state herein claims that its courts acted on procedural grounds and "insulated" Mr. Myers' conviction from federal review under Wainwright v. Sykes and Hankerson v. North Carolina. See Petition at 5-6. However, even assuming (but not conceding, see § A above) that the state court decided Mr. Myers' case on an asserted

procedural ground, this is of no avail to the state. For, as in shown below, whatever may be the extent of "insulation" allowable in other cases, adequate insulation could not be found in the present case, and Wainwright "cause" questions are therefore not implicated.

This Court held in Hankerson v. North Carolina, supra that Mullaney v. Wilbur, supra is to be given complete retroactive effect. Full retrospective application is required because the rule of Mullaney:

> ...was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that "substantially impairs the truth-finding function."

Hankerson v. North Carolina, supra, 432 U.S. at 242. This Court unequivocally and repeatedly emphasized that the rule

of Mullaney, which is required in order to protect the integrity of the fact-finding process, is to be given retroactive effect without regard to prior reliance on contrary rules or impact on the administration of justice. Id. at 241-244.

A possible narrow escape hatch from the full retroactive application of Mullaney was suggested in dicta in a footnote to Hankerson, which states in part:

> The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, e.g., Fed.Rule Crim. Proc. 30.

432 U.S. at 244, f.n. 8. This dicta suggests that states might be able to avoid retroactive application of the truth-protecting rule of Mullaney by:

1) enforcing; 2) an existing written rule of procedure (like Fed. Rule Crim. Proc. 30); 3) which informs defendants and their counsel that failure to contemporaneously object is a waiver of any claim of error.

The Washington Supreme Court could not, under the Hankerson dictum, conceivably insulate Mr. Myers' conviction from the retrospective impact of Mullaney. As is demonstrated in § A above, the Washington court's opinion in In re Myers did not, as arguably allowed by the Hankerson footnote, enforce a pre-existing contemporaneous objection rule the enforcement of which operated incidentally to deny a non-objector the retroactive impact of Mullaney. Rather, the Washington court, if In re Myers can be seen as a procedural case, clearly (1) used

consideration of impact on the administration of justice to (2) formulate for the first time a rule that failure to raise a constitutional infirmity in an instruction at trial or on appeal will prevent raising a retroactivity claim in a collateral proceeding. There was, and is, in Washington no contemporaneous objection rule requiring objection at trial to unconstitutional instructions; constitutional infirmities may be raised for the first time on appeal.[5] Moreover, at least until In re Myers itself, there was no rule precluding retroactive collateral relief absent objection at

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[5]This alone provides a clear distinction between this case and Engle v. Isaac. Ohio, whatever the validity of its enforcement of the rule, did have a clear, written contemporaneous objection rule with respect to instructions. See Isaac v. Engle, 646 F.2d 1122, 1125 n.4 (6th Cir. 1980).

trial or on appeal.[6]

These facts preclude the state's attempted reliance on footnote 8 of Hankerson. What, if anything, the Hankerson footnote will ultimately be found to allow states to do, it could not possibly be read to allow what Washington has tried to do to Mr. Myers. Hankerson could at most be read to allow enforcement of a clear, previously existing state contemporaneous objection

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[6]The Myers opinion consists of two holdings. Myers raised five issues, one of which as the retroactive application of Mullaney. The Washington Supreme Court ruled that: (1) the four issues in which retroactivity was not an issue could not be raised in a collateral proceeding, and (2) Mullaney would not be applied retroactively. In support of (1), the Court cited one earlier case; in support of (2), no previous Washington decision was cited. See 91 Wn.2d at 122, 123-126. This fact and the language used by the Washington Supreme Court prove that the rule in the second part of the opinion was new, not a previously-existing rule.

rule the operation of which precluded retrospective application of Mullaney. Hankerson could not be read to allow states to formulate a new rule after the fact of a purported default and then apply it to a person who could not have had notice of such new rule. Washington, having tried to formulate just such a new rule, cannot conceivably insulate Mr. Myers' conviction under Hankerson, and no issue of "cause" under Wainwright is presented.

Reading Hankerson and Wainwright together, as suggested by the state (Petition at 6) compels the same conclusion. Wainwright is based on the doctrine of adequate and independent state procedural grounds which potentially can prevent federal review of federal claims. This Court held that, as to those issues to which Wainwright

applies,[7] an adequate state procedural ground will prevent habeas review of federal issues unless the "cause/prejudice" test is met. The dictum in footnote 8 of Hankerson, generated six days before the decision Wainwright, also speaks in terms of procedural default, and is similarly based on the doctrine of the adequate and independent state procedural ground. Examination of that doctrine shows that there is no adequate state ground in this case.

Federal review is not precluded in every case in which a state refuses on asserted procedural grounds to hear

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[7] Wainwright does not necessarily apply to all types of federal constitutional issues; this Court left open the question of the breadth of Wainwright's application. See 433 U.S. at 88, n.12. The Court of Appeals in the present case found, inter alia, that Wainwright did not apply to the instruction claim in this case. See 646 F.2d at 359-360.

a federal constitutional claim. Rather, the doctrine of adequate state procedural grounds requires, as a threshold matter, review of the adequacy as a matter of federal law of procedural grounds asserted by the state as a bar to federal review. See, e.g., NAACP v. Alabama, 357 U.S. 449 (1958); Williams v. Georgia, 349 U.S. 375 (1955); Wright v. Georgia, 373 U.S. 284, 291 (1963); Bouie v. City of Columbia, 378 U.S. 347, 354 (1964); Staub v. Baxley, 355 U.S. 313 (1958).

Wainwright and Hankerson are squarely in the line of cases requiring careful scrutiny of the adequacy of state grounds at the threshold. In Wainwright, this Court meticulously determined both the existence of and constitutional adequacy of the state procedural rule which the court ultimately held would bar federal inquiry into the state court judgment.

433 U.S. at 85-87. Only after the adequacy of the state procedural ground was determined did the "cause/prejudice" test come into play. Ibid. Similarly, in footnote 8 of Hankerson (decided six days before Wainwright), the Court spoke of a "normal and valid" contemporaneous objection rule and cited Fed. Rule Crim. Proc. 30 (a clear, written rule giving notice of default absent objection) as an example. Therefore, unless an asserted state procedural ground meets federal standards for adequacy, analysis simply does not proceed to the "cause/prejudice" test of Wainwright , and federal review on the merits is warranted.

Application of federal standards for adequate state procedural grounds finds the state's asserted procedural ground in this case seriously wanting.

A state procedural ground is adequate only if it is embodied in a rule which gives clear notice that a failure to assert a claim will be a waiver. See Hankerson v. North Carolina, supra, 432 U.S. at 242, f.n. 8 (example of Fed. Rule Crim. Proc. 30); Wainwright v. Sykes, supra, 433 U.S. at 76 (Florida Rule Crim. Proc. 3.190(i)); Davis v. United States, 411 U.S. 233, 234 (1973) (Fed. Rule Crim. Proc. 12(b)(2)); Francis v. Henderson, 425 U.S. 536, 537 (1976) (provisions of Louisiana Code of Criminal Procedure). Moreover, in the area of forfeiture of constitutional rights of the accused, a contemporaneous objection rule has generally been required,i.e. a rule holding that failure to assert a claim at or before trial will be a waiver of any claim of error. See Wainwright v. Sykes, supra, 433 U.S. at 74, 84-86, 88-91; Ulster County Court

v. Allen, supra (lack of contemporaneous objection rule). In addition, asserted procedural defaults will not preclude review of constitutional claims when such defaults are unforeseeable under state law and/or are produced by novel application of state rules. NAACP v. Alabama, supra; Bouie v. City of Columbia, supra. See also Wright v. Georgia, supra, 373 U.S. at 291. Finally, state courts must apply a procedural rule fairly before it can qualify as an adequate state ground sufficient to bar the door to federal court; as stated by this Court:

> ...[W]here a state allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded [sic] from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect,

> an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner. [Footnote omitted.]

Williams v. Georgia, supra 349 U.S. at 383. [Emphasis added].

The state's asserted procedural default in the present case fails all federal tests as an adequate state ground. As is shown above at pp. 29-32, at the time Mr. Myers supposedly defaulted on his claim of unconstitutional instructions, there was no state objection rule in effect as to such defects, let alone a clear contemporaneous objection rule giving adequate notice of loss of rights upon default. Moreover, as is shown on the same pages, the rule the state tries to apply to Myers was novel in Washington and was first

announced in Mr. Myers' own case, obviously long after he could be expected to have followed it. Finally, the rule asserted by the state is far from consistently applied; as is shown at pp. 21-25 above, the state courts and the state's attorneys all assert that some claims like the retroactivity claim raised by Mr. Myers in this case will be heard in collateral proceedings in state court, while others, including Mr. Myers', will not.

The asserted "procedural" ground advanced by the state in the present case is thus totally inadequate as a matter of federal law. The procedural rule was generated in Mr. Myers' own case as a device in "avoidance of the federal right", Williams v. Georgia, supra, 349 U.S. at 383.

Since the asserted state procedural

ground is inadequate to preclude federal review, and since footnote 8 of the Hankerson opinion does not supply the missing adequacy, questions of the meaning of "cause" under Wainwright are not implicated in this case. Certiorari therefore should be denied as to such issues.

III. CLAIMED "RETRIAL PREJUDICE" CANNOT SERVE AS A BASIS FOR DISMISSAL UNDER RULE 9(a) OF THE RULES GOVERNING PETITIONS UNDER 28 U.S.C. § 2254.

The state, in requesting that an alleged issue under 28 U.S.C § 2254, Rule 9(a) be heard by this Court, asserts that so-called "retrial prejudice" can be a basis for dismissal of a habeas petition under that rule. No case authority is cited for this assertion (Petition at 10), and no convincing authority could be cited. As is shown below, both the language and his-

tory of the Rule show that claimed retrial prejudice is never a basis for dismissal under Rule 9(a).

Rule 9(a) of the Rules Governing Section 2254 Cases provides:

> Rule 9. Delayed or Successive Petitions
>
> (a) Delayed Petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Two basic principles are vital to construction of this rule. First, the "plain, obvious and rational meaning" of its language must be given effect. Chandler v. Rodenbush, 425 U.S.

840, 848 (1976) (citations omitted). Second, the rule is based on the doctrine of laches and is therefore in derogation of the general principles that there is no statute of limitations in habeas corpus proceedings and that the doctrine of laches is inapplicable. See Heflin v. United States, 358 U.S. 415, 420 (1956) (opinion of former Justice Stewart).[8] In view of both the "plain meaning" rule and the broad precedent holding laches inapplicable to habeas litigation, this Court should carefully scrutinize interpretations of Rule 9(a) which would expand the role of laches in habeas beyond the narrow

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[8]Other precedent in this Court is in accord. See, e.g., Uveges v. Pennsylvania, 335 U.S. 437 (1948) (petition delayed by 7 years, conviction reversed); Palmer v. Ashe, 342 U.S. 134 (1951) (petition delayed by 18 years held no bar to relief). Pennsylvania ex rel Hermann v. Claudy, 350 U.S. 116

terms of the rule.

Rule 9(a) says that dismissal may be had if the state is prejudiced in its ability to "respond to the petition" (emphasis added). Nothing is said about "retrial" prejudice as a basis for dismissal. The Rule therefore means that the state's ability to effectively answer the petition must have been injured as a pre-requisite to a Rule 9(a) dismissal.

This reading of Rule 9(a) is also supported by the plain language of Rule 5 of the Rules Governing Section §2254 Cases which sets forth the required contents of an answer and directs the answer to "respond to the allegations of the petition". Nowhere in Rule 5

8(cont.)
(1956) (8 year delay between conviction and petition held not to justify dismissal).

does one find the suggestion that difficulty of retrial is a relevant matter to be included in an answer.

The state's reliance on Advisory Committee notes to Rule 9 following 28 U.S.C. §2255 (federal counterpart of §2254 habeas corpus for state prisoners) is misplaced. Although that Comment does mention retrial prejudice, an analysis of the development of the language of both Rules 9(a) demonstrates that the comment is vestigial and now applies to neither final version of the respective rules governing §§2254 and 2255 pleadings.

In January, 1973, after several years of internal drafting and comment, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States published for comments and suggestions by the bench

and bar a preliminary draft of a set of proposed rules to govern the procedures on habeas corpus petitions by state prisoners and on motions under 28 U.S.C. §2255 by federal prisoners.[9]

As then promulgated for comment and suggestion, Rule 9(a) provided in pertinent part:

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[9] Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, Proposed Rules Governing Habeas Corpus Proceedings, Proposed Rules Governing §2255 Proceedings for the United States District Courts and Proposed Amendment to the Federal Rules of Appellate Procedure, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Jan., 1973 (U.S. Gov't Printing Office: 1973 0-490-393) at VII (hereinafter "Preliminary Draft").

> (a) Delayed Petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced by delay in its filing unless the petitioner shows that it is based on grounds of which he had no earlier knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred...

Preliminary Draft, supra, at 73.[10] The Advisory Committee Notes for the foregoing draft Rule 9(a) and its counterpart explained that dismissal could occur if either "...the delay has resulted in the state being prejudiced,"[11] the case of §2254 or, in the case of §2255, "...if the government has been prejudiced by the

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[10] Rule 9(a) of the §2255 Rules provided similarly. Preliminary Draft, supra, at 116.

[11] Preliminary Draft, supra, at 74.

delay. ..."[12] The Advisory Committee went on to say with respect to §2255 that "prejudice to the government both in meeting the allegations of the motion and in any possible retrial" were the dual targets of Rule 9(a)'s "flexible, equitable time limitation. ..."[13]

However, the above proposed version of the rule was not made the rule. A far more limited version of Rule 9(a) emerged from the meeting of the Judicial Conference in 1975. This limited version of Rule 9(a) added the language "in its ability to respond to the petition" to Rule 9(a) following the phrase "has been prejudiced."[14] Following the phrase "has been prejudiced"

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[12] Id. at 117.

[13] Id. at 120.

[14] H.R. Doc. No. 94-464, 94th Cong. 2d. Sess. (1976) [Rules of Procedure, Communication from the Chief Justice of

in the §2255 version of Rule 9(a) was added the language "in its ability to respond to the motion."[15] The Advisory Committee Notes were similarly amended to take into account the explicit elimination of retrial prejudice as a target of the preliminary draft of Rule 9(a). Following the phrase "and the delay has resulted in the state being prejudiced" in the §2254 Notes the language "in its ability to respond to the petition" was added.[16] And in the Notes to the §2255 version of Rule 9(a) following the phrase "if the government has been prejudiced" the phrase "in its ability to respond to the motion" was added.[17]

Thus, while the earlier statement of the

14(cont.) the United States] [hereinafter "Communication"] at 77.

15 Communication, supra at 98.

16 Id. at 135.

17 Id. at 158.

dual targets of Rule 9(a) of the §2255 Rules remained in the final version of the Advisory Committee Notes sent to Congress,[18] the redrafting of both Rules 9(a) and their advisory comments establish beyond doubt that only one target of Rule 9(a) remains -- prejudice in responding to pleadings seeking relief from confinement. The survival of retrial prejudice in the comment to the §2255 Rule 9 is obviously an accident and should not be relied upon.

Scholarly commentary,as well as the legislative history of Rule 9(a), compel the same result.

> From [the] language [of Rule 9(a)] it also appears the fears regarding the impact that delay might have on the possible retrial of the petitioner should relief be granted have no role in resolving the merits of the laches

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[18] Id. at 161.

> defense. Rather, the issue is the impact of the delay on the respondent's ability to respond to and defend against the federal post-conviction relief application. Thus, for example, the death of the only eyewitness to the crime for which the petitioner was convicted would be irrelevant if the issues raised by the petitioner's post-conviction application centered around the involuntary nature of his or her confession or guilty plea.

Clinton, Robert N., "Rule 9 of the Federal Habeas Corpus Rules: A Case Study of the Need for Reform of the Rules Enabling Acts", 63 IOWA L.REV. 15,48 (1977). [Emphasis is in original]

See also, Id. at 37.

In its report, the House Judiciary Committee made clear that prejudice must relate to responding to the petition, when it observed of the burden-shifting presumption of the proposed Rule 9(a):

> Those facts which make it difficult for the State to respond to an old claim (such as the death of the prosecutor) can readily be discovered by the State. It is not easy, in some instances not possible, for a prisoner to discover those facts that he would have to show in order to but the presumption of prejudice.

H.R. Report No. 94-1471, 94th Cong. 2d. Sess. (1976) (House Committee on the Judiciary Report on Rules on Habeas Corpus) at 5n.8 (Emphasis added).

From the foregoing discussion it is clear that asserted "retrial prejudice" cannot form a basis for dismissal in any case under Rule 9(a) governing §2254 cases. Therefore, certiorari to determine whether the Court of Appeals failed to deal with such alleged prejudice is totally unwarranted.

IV. EVEN IF CLAIMED "RETRIAL PREJUDICE" COULD BE A BASIS FOR DISMISSAL UNDER RULE 9(a) GOVERNING §2254 CASES, NO DISMISSAL WOULD BE WARRANTED IN THIS CASE BECAUSE THERE WAS NEITHER COGNIZABLE DELAY IN RAISING THE ISSUE ON WHICH PETITIONER WAS GRANTED RELIEF NOR ANY ACTUAL PREJUDICE SHOWN BY THE STATE.

The Court of Appeals was not obligated to assess "retrial prejudice" in this case, since retrial prejudice is not a basis for dismissal of a habeas corpus petition. See Argument §III, above. However, even if retrial prejudice could be a basis for dismissal in some cases, there is no ground for dismissal in this case. Dismissal under Rule 9(a) governing petitions under 28 U.S.C. §2254 is permitted only where a petition is "delayed", prejudice to the state has occurred, and the petitioner cannot show that the petition "is based on grounds of which he could not have had knowledge by the exercise of reasonable

diligence before the circumstances prejudicial to the state occurred." Even assuming retrial prejudice as a possible basis for dismissal, the state cannot prevail on any of the three requirements of Rule 9(a), for the following reasons.

First, there was no cognizable delay in raising the issue of retroactive application of Mullaney v. Wilbur, the issue on which Mr. Myers prevailed. He filed a state court petition for post-conviction relief very soon after this Court held Mullaney retroactive in Hankerson v. North Carolina, supra. See Counterstatement Of The Case, above.

Second, even if delay on the retroactivity issue were measured from the date of trial in 1957, Mr. Myers has shown that he could not earlier have known that the issue was there to

be raised. Until Mullaney was decided and held retroactive, no one could have known that this issue would be available to Mr.Myers.[19] The Court of Appeals correctly found that Mr. Myers could not have known of this issue. Myers v. Washington,supra,646 F.2d at 361-362.

Third, the state asserts no prejudice in responding to the petition on the retroactivity issue, nor could it assert any such prejudice. This issue is purely one of law based on the extant record from which nothing pertinent is missing.

Fourth, even if retrial prejudice could be a basis for Rule 9(a) dismissal, the state could not gain

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[19]The Mullaney issue was in substance raised on direct appeal in 1958. See Argument §I, above. However, Mr. Myers had no way of knowing that this Court would, in Mullaney and Hankerson, uphold and then retroactively apply the claims previously raised.

dismissal in this case. It is clearly the state's burden to demonstrate prejudice under Rule 9(a). And, as the Court of Appeals correctly found, the state "offered no specific facts as to witnesses now unavailable, records now inaccessible, or other factors supporting their assertions". Myers v. Washington, supra, 646 F.2d at 361, n. 10. Similarly, the state makes no specific allegations of retrial prejudice in this Court. The Petition simply paraphrases the Washington Supreme Court's conclusion in In re Myers, supra, that in general as to cases readjudiciated after many years evidence may be missing, witnesses may have moved or died, and memories will have dimmed. Compare Petition at 9 with In re Myers, supra, 91 Wn. 2d at 124-125 (finding only that retrial of

Mr. Myers "probably would" be less reliable, with no factual support).

The "sparse and incomplete" record and "factual vacuum" about which the state complains (Petition at 8) is thus the result of the state's inability or failure to meet its burden to show prejudice.

Fifth, it is doubtful that the state could ever show retrial prejudice in this case. It is obvious from the facts as recounted in the Court of Appeals' opinion that the main witness against Mr. Myers was Mr. Myers. The most important evidence at trial was Mr. Myers' confession and his testimony; he will be present at any retrial. In addition, the alteration in the retrial required by the Court of Appeals' granting of the writ is simply a change in jury instructions, not, e.g., the suppression of evidence. Moreover,

the transcript of the testimony of missing witnesses is admissible under Washington Evidence Rule (ER) 804 (b) (1), included in the Appendix. The state would be hard pressed to show actual prejudice here.

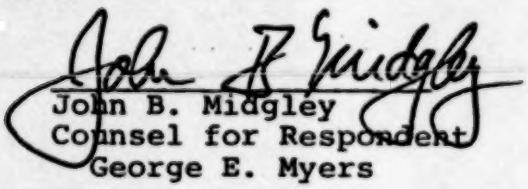
In summary, even if retrial prejudice could be a basis for dismissal under Rule 9(a) in some cases, it could not in this case, and the Court of Appeals was correct in not pursuing the issue further. For the same reasons, this Court should decline certiorari.

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be denied.

DATED this 6th day of January, 1982.

Respectfully submitted,



John B. Midgley
Counsel for Respondent
George E. Myers

EVERGREEN LEGAL SERVICES
109 Prefontaine Place South
Seattle, Washington 98104
(206) 464-5911

APPENDIX

Washington Evidence Rule 804 (b)(1):

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimoney is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

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NO. 81-1056

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF WASHINGTON,
Petitioner,

vs.

GEORGE E. MYERS,
Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION AND AFFIDAVITS OF RESPONDENT FOR LEAVE TO PROCEED IN FORMA PAUPERIS

John B. Midgley
Counsel of Record

109 Prefontaine Pl.S.
Seattle, WA 98104
(206) 464-5911

MOTION

Respondent George E. Myers, through counsel, moves pursuant to Supreme Court Rule 46 for leave to proceed in forma pauperis. To counsel's knowledge, Mr. Myers partially paid his previous attorney in the Court of Appeals and was later granted leave to proceed in forma pauperis.

This Motion is based upon the annexed affidavit of counsel and the attached copy of Respondent's affidavit of poverty in King County (Washington) No. 81-2-04207-4.

DATED this 6th day of January, 1982.

John B. Midgley
Counsel for Respondent

AFFIDAVIT OF JOHN B. MIDGLEY

State of Washington)
)ss.
County of King)

John B. Midgley, being first duly sworn upon oath, deposes and says:

1. I am a member of the Bar of this Court and counsel of record for Respondent George E. Myers.

2. Mr. Myers is incarcerated at the Washington State Penitentiary at Walla Walla.

3. I made arrangements for Mr. Myers to send me an affidavit supporting his request to proceed in forma pauperis, but the affidavit had not arrived as of today's mail.

4. I spoke with Mr. Myers by telephone on January 4, 1982. He told me: that as of last week he had about $110.00 on his institutional account; that he makes about $35.00 a month at a prison maintenance job; and that he has

no other funds at present.

5. Mr. Myers was recently granted leave to appeal in forma pauperis in a state court action, King County (Washington) Cause No. 81-2-04207-4. A copy of Mr. Myers' affidavit in state court is attached hereto as further evidence of his poverty.

6. The cost of reproducing, and having covers made for, 40 copies of a Brief in Opposition which was typed in this office and merely copied, cut to size and covered, would be several hundred dollars, more than Mr. Myers can afford.

John B. Midgley

SUBSCRIBED AND SWORN to before me this 6th day of January, 1982.

Notary Public, In and for the State of Washington, residing at Seattle.

81 JUL 22 P 4:04

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GEORGE EDWARD MYERS,

Petitioner,

v.

C. JAMES COUGHLIN, etc., et al.,

Respondents.

No. 81-2-04207-4

MOTION AND AFFIDAVIT FOR EXPENDITURE OF PUPLIC FUNDS, APPOINTMENT OF COUNSEL AND PREPARATION OF APPEAL RECORD

Petitioner GEORGE EDWARD MYERS, through his attorney John G. Ziegler, moves for an Order authorizing his appeal in the above cause in forma pauperis, such as to authorize preparation of the record and appointment of counsel.

JOHN G. ZIEGLER, Attorney for Petitioner

STATE OF WASHINGTON)
) ss. AFFIDAVIT OF PETITIONER
COUNTY OF KING)

GEORGE EDWARD MYERS, being first duly sworn, on oath deposes and says: I am the petitioner herein; my total assets consist of my painting brushes, etc., and oil paints, and my inmate account at the State Penitentiary of less than $150, whic I will use to buy more paints. My income from my Penitentiary job is $3[illegible] per month, and in addition I am sometimes able to sell my oil paintings. I am appealing the denial of my Petit for Writs of Habeas Corpus in this cause, and wish review of all issues raised in said Petition and the dismissal of the Petitio I believe that the appeal is meritorious. The costs sought to b waived or provided at public expense are (a) filing fee, (b) ce tified copy of Order Appointing Counsel, (c) Clerk's Papers and Verbatim Reports, and (d) attorney fees. I wish to have my at- torney JOHN G. ZIEGLER appointed to continue to represent me.

SUBSCRIBED AND SWORN to before me this 20th day of July, 1981.

Notary Public

JOHN G. ZIEGLER
ATTORNEY AT LAW
Walla Walla Office
224 Birch Street
Walla Walla, WA
99362
Seattle Office
5412 20th Avenue N.E.
Seattle, WA
98105

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

GEORDE EDWARD MYERS,

Plaintiff,

vs.

C. JAMES COUGHLIN, etc., et al

Defendant.

NO. 81-2-04207-4

ORDER AUTHORIZING WAIVER OR EXPENDITURE OF PUBLIC FUNDS AND APPOINTMENT OF COUNSEL ON APPEAL

THIS MATTER, having come on before the undersigned judge of the above-entitled court upon motion of defendant, and the court having considered the affidavit in support of said motion, and being fully advised, now, therefore,

IT IS ORDERED

1. That defendant is unable by reason of poverty to pay any of the expenses of appellate review except: NONE

2. That defendant can contribute the sum of $ NONE toward the cost of such appellate review.

3. That the Clerk's Papers (RAP 9.6) shall be provided at public expense.

4. That the portion of the record necessary for appellate review is:

(X) Pre-trial hearing before JUDGE COLEMAN on 3/24/81 (and cause and 72? and 70? State v. Myers)

(X) Trial (except opening, closing, voir dire) before JUDGE COLEMAN on 5/9-10/81 (This cause)

(X) Post-trial hearing before JUDGE COLEMAN on 6/25/81 (This cause)

( ) Sentence before _____ on _____;

( ) Probation revocation hearing before _____ on _____.

5. That the above record shall be provided at public expense, and a copy thereof supplied to defendant's counsel and the prosecuting attorney for their joint use.

6. That the costs of reproduction of appellant's briefs herein as provided by RAP 10.5 shall be provided at public expense.

7. That John G. Ziegler, a member of the bar of this Court, is appointed counsel on appeal, to be reimbursed at the public expense.

DONE IN OPEN COURT this 22 day of JULY, 1981.

JUDGE

Presented by:

JOHN G. ZIEGLER
Attorney for Defendant

Law Offices of
The Public Defender
633 Second Avenue
Seattle, Washington 98104

81-1056

IN FORMA PAUPERIS AFFIDAVIT

JAN 7 1982

United States Supreme Court
[Insert appropriate court]

RECEIVED
JAN 11 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

State of Washington
George E. Myers
(Petitioner)

v.

George Edward Myers
(Respondent(s))

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, George E Myers, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [X] No [ ]
   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.
   $65.00 per months Wash. St. Penitentiary
   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or form of self-employment? Yes [X] No [ ]
   b. Rent payments, interest or dividends? Yes [ ] No [X]
   c. Pensions, annuities or life insurance payments? Yes [ ] No [X]
   d. Gifts or inheritances? Yes [ ] No [X]
   e. Any other sources? Yes [ ] No [X]

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. Sale of paintings; $375.00 (Cost of material — $400.00, Net loss: $25.00)

3. Do you own cash, or do you have money in a checking or savings account?

   Yes [X] ~~No [X]~~ (Include any funds in prison accounts.)

   If the answer is "yes," state the total value of the items owned.

   $98.00 in prison account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   Yes [ ] No [X]

   If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. none

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 4, 1982
(Date)

George E. Myers
(Signature)

No Notary Available

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $_____ on account to his credit at the _____ institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said institution: _____

_____
Authorized Officer of Institution

(prison Ledger not available until next week)